TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 188

ALBERT E. McKENZIE, AS TRUSTEE IN BANKRUPTCY OF GRAVES-QUINN CORPORATION, PETITIONER,

vs.

IRVING TRUST COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 23, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN COURT OF APPEALS OF NEW YORK**

ALBERT E. MCKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION, Plaintiff-Appellant,

against

IRVING TRUST COMPANY, Defendant-Respondent

STATEMENT UNDER RULE 234

This action was commenced by the service of a summons and complaint on November 24, 1941. Issue was joined by the service of the amended answer of defendant on January 2, 1942.

The names of the original parties are given in full above.

The attorneys for plaintiff are M. Carl Levine, Morgulas & Foreman.

The attorney for defendant is Paul E. Mead.

There has been no change of parties or attorneys herein.

[fol. 2] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please take notice that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from the order made in the above entitled action and entered in the Office of the Clerk of the County of New York on the 5th day of December, 1942, denying the motion of defendant to dismiss the first cause of action set forth in the complaint, and the appeal is taken from the whole and from each and every part of said order.

Dated: New York, December 15, 1942.

Yours, etc., Paul E. Mead, Attorney for Defendant, Office & P. O. Address, One Wall Street, Borough of Manhattan, City of New York.

To: M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

The Clerk of the County of New York.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

Special Term, Part 1

Index Number 7149—Year 1942

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION, Plaintiff,

against

IRVING TRUST COMPANY, Defendant

Present: Hon. William T. Collins, Justice.

ORDER APPEALED FROM

The following papers numbered 1 to 32 read on this motion, argued Dec. Res. this 30th day of October, 1942, Calendar No. 68.

	Papers Numbered
Notice of Motion and Affidavits Annexed Exhibits	1-17
Answering Affidavits Exhibits	18-22
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[fol. 4] Upon the foregoing papers this motion by the defendant to dismiss the first cause of action is denied. (See memo filed herewith.)

Enter,

W. T. C.,
J. S. C.

Opinion filed herewith.
Dated December 4th, 1942.
Briefs: Plaintiff's A(2) Defendant's A(2).

IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that on the complaint; the amended answer thereto, the annexed affidavits of Orvil E. Miles and William A. Onderdonk, each verified the 14th day of August, 1942, and upon all the other papers and proceedings herein, [fol. 5] the undersigned will apply to this court at a Special Term, Part I thereof, to be held at the County Court House, Borough of Manhattan, City of New York, on the 11th day of September, 1942, at the opening of court on that day or as soon thereafter as counsel can be heard, for judgment in favor of defendant dismissing the first cause of action of the complaint upon the ground that the defenses thereto are sufficient as matter of law and founded upon facts established by documentary evidence or official record, and for such other and further relief as to the court may seem proper.

All answering affidavits must be served at least five days before the return day of this motion.

Dated: August 25, 1942.

Yours, etc., Paul E. Mead, Attorney for Defendant, Office & P. O. Address, One Wall Street, New York, New York.

To: M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

[fol. 6] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

[Same title]

STATE OF NEW YORK,
County of New York, ss.:

ORVIL E. MILES, being duly sworn, says:

I am an Assistant Secretary of Irving Trust Company, defendant herein, and have held such position at all the times hereinafter mentioned.

During the months of October, November and December, 1940, and for some time prior and subsequent thereto I was located at the Lincoln Office of defendant where Graves-Quinn Corporation, the bankrupt herein, maintained and had for many years maintained an account.

My duties were those of a lending officer; in which capacity I came in contact with Graves-Quinn upon the occasions herein mentioned. On October 10, 1940 Graves-Quinn obtained from defendant, acting through deponent, the first of a series of advances to finance its operations under a certain contract with the War Department No. W 6101 qm-131, dated September 14, 1940. Attached hereto, marked Exhibit A and made a part hereof is a photostatic copy of the loan and discount ledger of defendant showing all the loan transactions with Graves-Quinn for the period covered and evidenced by promissory notes. There were at times advances in the form of overdrafts on the checking account of Graves-Quinn.

The only overdrafts of significance on this motion are those occurring immediately prior to November 28, 1940. At the opening of business on November 20, 1940 there was [fol. 7] to the credit of Graves-Quinn's checking account $45,347.46. As of the close of business on that day and the succeeding business days the checking account of Graves-Quinn was overdrawn as follows:

November 20, 1940	$ 4,622.00
November 21 (Thanksgiving Day)	
November 22	15,345.93
November 23	18,838.16
November 24 (Sunday)	
November 25	33,045.20
November 26	40,704.00
November 27	40,812.00
November 28	13,867.47

On November 20, 1940 Graves-Quinn Corporation executed an assignment to defendant of all moneys due and to become due to it under the War Department contract above mentioned. A photostatic copy thereof, marked Exhibit B, is annexed hereto and made a part hereof. The assignment was prepared by defendant and mailed to Graves-Quinn on November 18, 1940, accompanied by a letter, a copy of which, marked Exhibit C, is annexed hereto and made a

part hereof. Like the other annexed letters signed by deponent, defendant's letterhead does not appear in the copies. The assignment, duly executed, was received by deponent on behalf of defendant on November 22, 1940. The purpose of the assignment was to secure defendant for the advances made and to be made. Attached hereto, marked Exhibit D, is a copy of letter written by Graves-Quinn to defendant, dated March 19, 1941. The request of Graves-Quinn was at once complied with. Attached hereto, marked Exhibit E, is copy of letter, dated March 20, 1941, sent to [fol. 8] Graves-Quinn. On November 27, 1940, one copy of the assignment was dispatched to the Quartermaster General with a letter, a copy of which, marked Exhibit F, is annexed hereto and made a part hereof.

On December 2, 1940, a letter was sent to Standard Accident Insurance Company, surety on the payment and performance bonds written in connection with the said contract, a copy of which, marked Exhibit G, is annexed hereto and made a part hereof. On the same date similar letters were sent to the General Accounting Office, Washington, and to the Disbursing Officer, United States Army Base, Boston, Massachusetts. In each instance a true copy of the assignment accompanied the letter. Also the Contracting Officer was notified of the assignment and furnished with a copy thereof.

On December 5, 1940 the consent of the Secretary of War to the assignment was issued and delivered to defendant. A copy thereof, marked Exhibit H, is annexed hereto and made a part hereof. Attached hereto, marked Exhibit J, and made a part hereof, is copy of a memorandum on behalf of the Quartermaster General to the Assistant Secretary of War recommending that the assignment be approved.

On December 6, 1940 copies of the consent of the Secretary of War were mailed to each of the persons to whom notice of the assignment had been given.

On November 27, 1940 the government issued and delivered to Graves-Quinn Corporation in Boston a check for $155,865.50 pursuant to the contract aforesaid. On that day and after the said check had been received by Lewis W. Graves, Treasurer of Graves-Quinn, I talked by telephone [fol. 9] with Mr. Graves, who told me that the check was being mailed to defendant. This was in accord with my wishes. On the following day, which was November 28,

1940, defendant received the check duly endorsed in an envelope which bore a postmark "10 P. M." under date of November 27, 1940. In a memorandum made by me on November 28 for the Graves-Quinn file, there is this reference to the check and its mailing:

> "Although Mr. Graves informed us by telephone at 4:45 yesterday afternoon that the government check had been received and would be mailed shortly thereafter, the check had not arrived in this morning's mail. The Graves-Quinn office in New York was in receipt of a letter from Mr. Graves written yesterday evening stating that the check had been mailed to us. • • • About 2 o'clock the check arrived. The envelope bore Boston postmark '10 P. M.' yesterday."

Along with the government check defendant received from Graves-Quinn its check for $150,000, dated November 27, 1940, payable to the order of defendant, a photostatic copy of which, marked Exhibit K, is annexed hereto and made a part hereof. On November 28, the account of Graves-Quinn was credited the amount of the said check for $155,865.50 and the check was collected in due course. On November 28, 1940 also the account of Graves-Quinn was debited the amount of the check for $150,000. The entries made on November 28, 1940 reflect, in form at least, discharge of the obligations of Graves-Quinn to defendant in the amount [fol. 10] of $150,000. The entire payment came out of the government remittance of $155,865.50. What occurred on November 28, 1940 was the consummation of the prior issuance and delivery of the checks referred to and the still earlier assignment by Graves-Quinn Corporation whereby the right to the payment evidenced by the government check had been transferred to defendant. It is the issuance of the $150,000 check to defendant by Graves-Quinn of which plaintiff complains in this action.

One of the notes retired on November 28, 1940 was for $50,000, payable by its terms on December 9, 1940. Anticipation of this note is a circumstance of no consequence whatever. When the advances to Graves-Quinn were negotiated in connection with the contract referred to, it was part of the arrangement that advances should be repaid as and when payment were received by Graves-Quinn from the government. As appears from Exhibit A only three

notes were on a time basis and all three, of which the said note for $50,000 was the last, were paid in advance of the maturity dates.

All the payments becoming due from the government to Graves-Quinn subsequent to the aforesaid payment of $155,865.50 made on November 27, 1940, and until the contract was completed were made directly by the government to defendant as assignee. The basis for the diversion of payments from Graves-Quinn to defendant was the assignment heretofore referred to and marked Exhibit B. There was no other instrument of assignment.

That Graves-Quinn, when it made the assignment to defendant, had exhausted its authority to assign is evident [fol. 11] from the letter of the Finance Officer, U. S. Army, a copy of which, marked Exhibit L, is annexed hereto and made a part hereof.

Wherefore, deponent respectfully asks that defendant have judgment dismissing the first cause of action upon the ground that the right of defendant to the payment out of the avails of the contract under which it had the assignment became fixed outside the four months' period to which the plaintiff is limited in attacking payments as preferential under the Bankruptcy Act.

Orvil E. Miles.

(Sworn to before Adam N. Keppler, August 14, 1942.)

[fol. 12] EXHIBIT A, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

(Opposite page)

(Here follow 2 photolithographs, side folios 13, 13a)

CUSTOMERS LIABILITY—LOANS AND DISCOUNTS

Guaranteed By _____ Amount $ _____

Guaranteed By _____ Amount $ _____

General Collateral Agreement on file dated _____ 193__

Name _____

Address _____

Business _____

Affiliations _____

DATE 193...	OTHER MAKER OR ENDORSER	RATE	DUE	DEBITS	CREDITS	BALANCES OWN UNSECURED NOTES	BALANCES OWN COLLATERAL NOTES	BALANCES NOTES RECEIVABLE DISCOUNTED
7/19	[illegible]	[illegible]	8/18	20000		20000		
[illegible]	[illegible]	[illegible]	[illegible]	20000		40000		
[illegible]	[illegible]	[illegible]	[illegible]	5000		45000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	20000	47500		
[illegible]	[illegible]	5	9/17	20000	[illegible]	35000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	5000	30000		
[illegible]	[illegible]	[illegible]	10/17	20000	30000	20000		
[illegible]	[illegible]	[illegible]	11/17	15000	20000	15000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	15000	01		
[illegible]	[illegible]	[illegible]	[illegible]	15000	[illegible]	15000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	0		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	15000	20000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	0		
[illegible]	[illegible]	[illegible]	9/16	10000	[illegible]	10000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	10000	0		
[illegible]	[illegible]	[illegible]	[illegible]	3000	[illegible]	3000		
[illegible]	[illegible]	[illegible]	[illegible]	40000	[illegible]	70000		
[illegible]	[illegible]	[illegible]	Demand	35000	70000	35000		
[illegible]	[illegible]	[illegible]	1/4	50000	[illegible]	85000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	35000	50000		
[illegible]	[illegible]	[illegible]	Demand	30000	[illegible]	80000		
[illegible]	[illegible]	[illegible]	[illegible]	30000	[illegible]	110000		
[illegible]	[illegible]	[illegible]	[illegible]	40000	[illegible]	150000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	150000	0		
[illegible]	[illegible]	[illegible]	[illegible]	82000	[illegible]	82000		

CUSTOMERS LIABILITY - LOANS AND DISCOUNTS

GUARANTEED BY — AMOUNT $

GUARANTEED BY — AMOUNT $

GENERAL COLLATERAL AGREEMENT ON FILE DATED — 19

NAME

ADDRESS

BUSINESS

AFFILIATION

DATE 19	OTHER MAKER OR ENDORSER	RATE	DUE	DEBITS	CREDITS	BALANCES — OWN UNSECURED NOTE	BALANCES — OWN COLLATERAL NOTE	BALANCES — NOTES RECEIVABLE DISCOUNTED

13a

[fol. 14] EXHIBIT B, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

Assignment by Graves-Quinn Corporation of Rights Under War Department Contract No. W 6101 qm-131 for the Construction and Completion of Temporary Housing at the Harbor Defenses of Boston, Narragansett Bay, Portland and Newport.

Know all men by these presents, that Graves-Quinn Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal office at Grand Central Terminal Bldg., New York, N. Y. (hereinafter called the "Assignor"), in consideration of $1.00 lawful money of the United States to it paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto Irving Trust Company, whose principal office is at One Wall Street, New York, N. Y. (hereinafter called the "Assignee"), to its own proper use and benefit, all the right, title and interest of the Assignor in and to any and all sums of money now due or to become due under War Department Contract No. W 6101 qm-131.

The Assignor represents that said Contract is an existing Contract, binding on both the Assignor and the United States Government, that it is not subject to any defense, set-off or counter-claim, and that the full contract price is $1,008,800.00, of which an aggregate of not les than $831,677.06 remains unpaid and payable upon due performance of the Contract.

[fol. 15] The Assignor gives the Assignee full power and authority for its own use and benefit to ask, demand, collect, receive and give acquittance for such sums or any part thereof, and in the Assignor's name or otherwise to prosecute or withdraw any suits or proceedings at law or in equity therefor.

The Assignor will at all times hereafter at the request of the Assignee make, do and execute all such further and other acts and deeds as shall be reasonably required to enable the Assignor to collect all sums due or to become due under said Contract according to the intent and purpose of this instrument.

In Witness Whereof, the Assignor has duly caused this instrument to be executed and its seal to be hereunto affixed this 20 day of Nov., 1940.

Graves-Quinn Corporation. By Wm. T. Quinn, President. (Seal.)

Attest:
Lewis W. Graves, Secretary.

[fol. 16] COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On the 20th day of November, 1940, before me personally came Wm. T. Quinn, to me known, who being by me duly sworn, did depose and say that he resides in Cranford, N. J.; that he is the President of Graves-Quinn Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Louis I. Fleischman, Notary Public.

[fol. 17] EXHIBIT C, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

November 18, 1940.

Mr. Lewis W. Graves, Secretary & Treasurer
Graves-Quinn Corporation,
77 Summer Street,
Boston, Massachusetts

Dear Mr. Graves:

In accordance with our recent conversation, we enclose in six counterparts, an assignment in our favor of your corporation's rights under War Department Contract No. W 6101 qm-131.

You will note that in the second paragraph there are spaces in which should be entered the full contract price and also the unpaid balance.

One copy of the assignment should be retained for your records and the original and four copies forwarded to us. The extra four copies need to be filed with (1) the General Accounting Office of the Government, (2) the Government Contracting Officer, (3) the surety company, and (4) the Government Disbursing Officer. Since the contract was entered into prior to October 9, 1940, it will be necessary that the assignment be consented to by the Secretary of War or his duly authorized representative.

Very truly yours, Orvil E. Miles, Assistant Secretary.

[fol. 18] EXHIBIT D, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

Graves-Quinn Corporation
General Contractors
Grand Central Terminal
New York

Wm. T. Quinn, Pres. Lewis W. Graves, Sec. & Treas.

March 19, 1941.

Irving Trust Company,
Park Ave. & 42nd Street,
New York, New York

Attention: Mr. O. Miles

GENTLEMEN:

All loans from the bank to us being fully paid, we request that a release of the assignment of payments on the Government contract for the Temporary Housing, Harbor Defenses, New England be executed and forwarded to the Finance Department in Boston.

Your early attention and action will be appreciated.

Yours very truly, Graves-Quinn Corporation, Lewis W. Graves.

LWG:MM.

[fol. 19] EXHIBIT E, ANNEXED TO AFFIDAVITS OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

March 20, 1941.

Mr. Lewis B. Graves, Treasurer, Graves-Quinn Corporation, Grand Central Terminal, New York, N. Y.

DEAR MR. GRAVES:

In response to your letter of March 19, we have executed a release of the assignment of payments due under War Department Contract No. w6101 qm-131.

Copies of this release have been mailed to each of the parties notified of the assignment. An additional copy is attached for your records.

Very truly yours, Orvil E. Miles, Assistant Secretary.

OEM:FM.

[fol. 20] EXHIBIT F, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

November 27, 1940.

Quartermaster General George E. Hartmann, United States Army, Washington, D. C.

DEAR SIR:

Re: War Department Contract No. W 6101 qm-131, for the construction and completion of temporary housing at the harbor Defenses of Boston, Narragansett Bay, Portland and Newport.

Graves-Quinn Corporation

We enclose an assignment in our favor by Graves-Quinn Corp., dated November 20, 1940, of all sums of money now due or to become due under the above described contract.

As this contract was entered into prior to the date of approval of the Assignment of Claims Act of 1940, we are writing to request the approval of the Head of the Department concerned and should appreciate your cooperation in obtaining this approval. The enclosed copy of the assignment is for your records as Contracting Officer.

We assume that the approval of the Head of the Department is given by letter and consequently have not enclosed the other copies of the assignment. In the event, however, that they require some notation by the Department Head, we shall forward them for that purpose.

Respectfully yours, Orvil E. Miles, Assistant Secretary.

[fol. 21] EXHIBIT G, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

December 2, 1940.

Standard Accident Insurance Co., 111 John Street, New York, N. Y.

Attention: Mr. Clarence Glenn

DEAR SIRS:

Re: War Department Contract No. W 6101 qm-131, Assignment by Graves-Quinn Corporation to Irving Trust Company.

We hereby notify you that on November 20, 1940, the Graves-Quinn Corporation assigned all monies due or to become due under the above mentioned contract to Irving Trust Company. A true copy of the instrument of assignment is enclosed, herewith, to be filed in your office.

As this contract was entered into prior to the date of approval of the Assignment of Claims Act of 1940, the consent of the Head of the War Department is required. For your information a copy of this assignment was forwarded to George E. Hartmann, Quartermaster General, on November 27, requesting the required consent.

Very truly yours, Orvil E. Miles, Assistant Secretary.

[fol. 22] EXHIBIT H, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

War Department

Office of the Assistant Secretary

Washington, D. C.

December 5, 1940.

Consent of the Secretary of War to the Assignment of Moneys Due or to Become Due Under a War Department Contract Entered into Prior to October 9, 1940.

The Secretary of War hereby gives his consent to the Graves-Quinn Corporation, of New York, N. Y., contractor under War Department Contract No. W 6101 qm-131, dated September 14, 1940, to assign to a bank, trust company, or other financing institution, including any Federal lending agency, all moneys due or to become due under such contract and not already paid; Provided, however, that such assigned claim or claims shall be subordinate to any claims of the United States Government on account of advance payments heretofore or hereafter made by the Government to the Contractor for the purpose of financing such contract and subordinate also to any other claims against the Contractor that the Government or any agency or instrumentality thereof may at any time have, whether arising out of said contract or otherwise, and *Provided further*, that the assignment and any action taken thereunder shall [fol. 23] conform in all respects to the provisions of the Assignment of Claims Act of 1940.

By direction of the Secretary of War:

Robert P. Patterson, The Assistant Secretary of War.

Note: The assignee should file with the General Accounting Office, the contracting officer, the surety or sureties on the bond, and the disbursing officer designated in such contract to make payments, a true copy of this consent in connection with the true copy of the assignment as required by the Assignment of Claims Act of 1940.

The Assignee will not divulge any information concerning the contract, or contained therein, except to those persons necessarily concerned with the transaction.

[fol. 24] EXHIBIT J, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

December 4, 1940.

Memorandum to: The Assistant Secretary of War.

Subject: Request for Approval of Assignment of Contract Claim.

1. Contract No. W 6101 qm-131, dated September 14, 1940, by and between The United States of America and Graves-Quinn Corporation for the construction and completion of temporary housing in Massachusetts and Rhode Island, was entered into prior to October 9, 1940, the date of approval of the Assignment of Claims Act of 1940. Subdivision 1 of the Assignment of Claims Act of 1940 provides:

> "1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned."

2. It is the opinion of this office that the attached assignment has been executed pursuant to and in accordance with the Assignment of Claims Act of 1940 and, therefore, constitutes a valid assignment.

3. It is recommended that the attached assignment be approved by you in accordance with the provisions of sub-
[fol. 25] division 1 of the Assignment of Claims Act of 1940.

For The Quartermaster General:
C. D. Hartman, Brigadier General, Q. M. C. Assistant. By M. B. Birdseye, Lt. Col., Q. M. Corps., Assistant.

1 Inclosure: Assignment of Claims, 11/20/40.

[fol. 26] EXHIBIT K, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

(Opposite page)

(Here follows 1 photolithograph, side folio 27)

NEW YORK Nov. 27, 1940 No 10157

IRVING TRUST COMPANY

NEW YORK

PAY TO THE ORDER OF Irving Trust Company $150,000.00

---One Hundred Fifty Thousand and no/100---------- DOLLARS

GRAVES-QUINN CORPORATION

GRAVES-QUINN CORPORATION

PRESIDENT

TREASURER

GRAVES-QUINN CORPORATION

27

[fol. 28] EXHIBIT L, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

Finance Department, U. S. Army, Office of Finance Officer, U. S. Army, Army Base, Boston, Mass.

ISW/gba.

In reply refer to: FO 158 (Irving Trust Company)

March 21, 1941.

To Irving Trust Company, 42nd Street at Park Avenue, New York, N. Y.

Attention: Orvil E. Miles, Assistant Secretary

Re: Contract No. W 6101 qm-131 Graves Quinn Corp.

DEAR SIRS:

Receipt is acknowledged of your letter of March 20, 1941, and the release of assignment inclosed therein. It is the view of this office that the Assignment of Claims Act of 1940 contemplated the assignment of *all* money due under a contract, and that until the termination thereof, payments must be made to the assignee. On that basis, the release of assignment is returned.

It is noted that the receipted copies of the notice of assignment from the Standard Accident Insurance Company have not been forwarded to this office, and inquiry is made if same have been received by you. There are sev- [fol. 29] eral accounts now in this office but payment thereof cannot be made until the notices referred to are at hand.

Upon their receipt, payment will be made to you as assignee, as heretofore.

Very truly yours, Finance Officer, U. S. Army, I. S. Werman, Captain, F. D., Assistant.

1 Incl.

In Supreme Court of New York

Affidavit of William A. Onderdonk, Read in Support of Motion

[Same Title]

State of New York,
County of New York, ss:

William A. Onderdonk, being duly sworn, says:

I am an attorney associated with Paul E. Mead, attorney for defendant herein and in immediate charge of this action for defendant. The action was commenced by the service of a summons and complaint on November 24, 1941. The complaint contains two causes of action, both brought to recover the identical sum of $150,000 with interest from November 28, 1940, which principal sum was received by defendant from Graves-Quinn in discharge of obligations in said amount of Graves-Quinn to defendant. The claim is that payment was preferential. The first [fol. 30] cause of action is based on the Bankruptcy Act, and the second on Section 15 of the Stock Corporation Law. The necessary allegations of the insolvency of Graves-Quinn, knowledge on the part of defendant, and the insufficiency of the assets to pay in full the liabilities of the bankrupt and preferential intent are set forth.

The amended answer of defendant was served on January 2, 1942. This answer denies the material allegations upon which liability is predicated and in addition sets up three separate defenses.

The first defense alleges the execution of a contract by Graves-Quinn and the War Department for the construction by Graves-Quinn of certain housing projects in New England for a stated consideration of $1,008,800; that Graves-Quinn applied to defendant for assistance in financing the construction; that commencing on October 10, 1940 defendant from time to time loaned money to Graves-Quinn, evidenced by promissory notes, upon the promise of Graves-Quinn that all notes outstanding at any of the times when payments were received by it from the United States should be fully paid without regard to the maturity dates of the notes; that on November 27, 1940 Graves-Quinn received from the United States for work done pursuant to the said contract payment by check in the sum of $155,-

865.50; that the check, duly endorsed, was delivered to defendant on November 27, 1940 and credited to the Graves-Quinn account on November 28, 1940, on which date defendant held four promissory notes of Graves-Quinn aggregating the face amount of $150,000, three of which were payable on demand and one note for $50,000 by its terms [fol. 31] payable on December 9, 1940; that the said note for $50,000 was properly payable at the time Graves-Quinn received the said payment of $155,865.50 from the United States by reason of the agreement underlying the advances made by defendant; that on and after November 27, 1940 defendant had a lien and right of offset against the deposit balance of Graves-Quinn to the amount of $150,000; that on November 27, 1940 Graves-Quinn issued and delivered to defendant its check for $150,000 on its said account by reason of which the account was on November 28, 1940 debited in said amount and the liability of Graves-Quinn on the aforesaid notes fully discharged; that the said transaction is the transfer and payment of which plaintiff complains and that the delivery and credit of the check for $155,865.50 and the payment of the notes were in the normal and regular course of business as it had been carried on between Graves-Quinn and defendant prior thereto, and as such business continued to be carried on thereafter, whereby outstanding notes were retired as Graves-Quinn received payment from the United States pursuant to its said contract and new advances were made by defendant in anticipation of further payments to be received from the United States.

The second defense, after repeating the allegations of the first defense relative to the contract, and the arrangement for financing between Graves-Quinn and defendant, alleges further that on or about November 20, 1940 Graves-Quinn, for a valuable consideration, executed and delivered to defendant as security to all existing and future loans made by defendant, an assignment of its right, title and interest in and to all sums of money then due or thereafter [fol. 32] to become due under said contract; that the said assignment was duly approved by the Secretary of War and written notice thereof, together with true copies of the instrument of assignment, were duly filed with the several offices prescribed in the Assignment of Claims Act of 1940; that as of November 18, 1940 there was payable to

Graves-Quinn under the said contract the sum of $155,865.50 and thereafter and prior to November 28, 1940 a check in said amount in favor of Graves-Quinn was issued and delivered to said corporation, which corporation, by reason of the said assignment, received said check as the property of defendant; that on November 27, 1940 said check for $155,865.50, duly endorsed, was delivered to defendant and by it received in both due and normal course of business and as assignee, and out of the avails thereof defendant received the sum of $150,000 in discharge of the outstanding obligations of Graves-Quinn then due and payable, and that said payment is the payment and transfer referred to in the complaint.

The third defense is partial and alleges in short that of the sum of $150,000 advanced by defendant to Graves-Quinn repayment of which plaintiff challenges, $40,000 was advanced after the date of the said assignment.

The motion pending is addressed to the first cause of action only and rests on the contention that the rights of the defendant in and to the payments complained of were determined by events preceding November 28, 1940, and that, being outside the statutory period of four months by which plaintiff is limited, are immune to attack.

One of the reliances of defendant on its motion is the assignment executed by Graves-Quinn shortly after the [fol. 33] adoption of the Assignment of Claims Act of 1940, which was designed to enable contractors holding government contracts to finance performance thereunder. While the legal aspects of the matter will be discussed in a brief, deponent refers here to Volume 86, Part 11, Page 12,557 of the Congressional Record for an explanation of the purposes of the statutory provision requiring the consent of the Department Head to the assignment of contracts entered into prior to the adoption of the Assignment of Claims Act of 1940 The debate includes the following explanation:

> "Mr. Youngdahl. Does the gentleman feel that the provision in this bill requiring the consent of the agency making the contract will in any way act as a deterrent to the purpose for which this bill is being passed?
>
> "Mr. Summers of Texas. May I make this explanation to the gentleman who introduced the first bill covering these matters? If this bill is not enacted

there can be no assignment of claims. That is the first proposition. The agencies of the Government which have responsibility are themselves responsible for proposing this legislation. They came down to the Committee on the Judiciary, as the gentleman from Michigan explained, and indicated their desire to increase as far as possible the number of persons who could bid on these contracts, and who could help the Government in this emergency. They said, however, with reference particularly to some of the equipment material, with regard to which secrecy had to be preserved, [fol. 34] that they did not want to take the responsibility of advising that in every case these claims should be assignable, or that there would not be in the nature of things some claims that should not be assigned. As the gentleman from Michigan (Mr. Michener) has fully explained, the committee after full consideration agreed that it would not like to take the responsibility of trying to override the expressed judgment of those who are themselves in responsibility with regard to the whole program."

The statute provided that in the case of any contract entered into after the adoption thereof a stipulation therein forbidding assignment would preclude assignment. This provision as to subsequent contracts, together with the requirements of the consent as to prior contracts, served to prevent the assignment of any contract which the Government authorities did not want assigned.

This suit involves the question whether in large part the losses incident to the failure of Graves-Quinn are to be borne by the Standard Accident Insurance Company, which wrote the payment and performance bonds pursuant to which it was liable to pay the laborers and materialmen on the job, or by the defendant who, after the War Department contract No. W6101 qm-131 between the Government and Graves-Quinn had been executed and the bonds had been written, financed the work to completion. The surety instigated the bankruptcy proceedings and if these proceedings had any other purpose than the pending suit against defendant in this action that purpose has not been disclosed. [fol. 35] This fact is without legal significance on the very limited ground upon which the first cause of action is being

attacked, and is only mentioned to preclude any assumption that Irving Trust Company was paid at the expense of the workmen and materialmen employed by Graves-Quinn in connection with the aforesaid contract. To the extent they were not paid out of the advances made by defendant they have been largely, if not wholly, paid by the surety.

Wm. A. Onderdonk.

(Sworn to before Adam H. Keppler, August 14, 1942.)

In Supreme Court of New York

Complaint, Read in Support of Motion

[Same Title]

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, by M. Carl Levine, Morgulas & Foreman, his attorneys, alleges as follows:

As and for a First Cause of Action:

1. That on March 28th, 1941, in the United States District Court for the Southern District of New York, a petition in involuntary bankruptcy was filed against the Graves-Quinn Corporation (hereinafter referred to as the "bankrupt"), praying that it be adjudged bankrupt, and thereafter and on June 19th, 1941, it was duly adjudicated bankrupt in such Court.

[fol. 36] 2. Upon information and belief, that the defendant at all times hereinafter mentioned was, and still is, a domestic corporation.

3. That thereafter and at a special meeting of the creditors of said bankrupt, certain of which creditors were in existence at the time of preferential payment hereinafter more particularly complained of, duly called and held by Hon. Peter B. Olney, Referee in Bankruptcy, in charge of said proceedings, the plaintiff herein on the 14th day of July, 1941, was duly appointed Trustee in Bankruptcy, and duly qualified and is now acting as such Trustee.

4. Upon information and belief, that within four months before filing of the aforesaid involuntary petition in bankruptcy against said bankrupt, while insolvent, and indebted to the defendant, and other creditors of the same class upon unsecured indebtedness provable in bankruptcy, the said bankrupt made a transfer of a portion of its property to the defendant by making payments to it on or about November 28th, 1940, in the amount of $150,000.00 for or on account of said antecedent debt.

5. Upon information and belief, the effect of such payment by the bankrupt to the defendant was to enable said defendant to obtain a greater percentage of its debt than some other creditor of the said bankrupt of the same class as defendant, and that said payment did thus operate as a preference under the provisions of the Bankruptcy Act of 1898, and the Amendments thereto.

[fol. 37] 6. Upon information and belief, that the said defendant had at the time when said transfer and payment was made reasonable cause to believe that said bankrupt was insolvent within the purview of the aforesaid Bankruptcy Act.

7. That the plaintiff has insufficient assets in its hands to pay in full the liabilities of the bankrupt.

8. That the plaintiff has duly demanded of the defendant the restitution and return of said preferential payment, but same has been refused.

As and For a Second Cause of Action:

9. Upon information and belief, that the defendant at all times hereinafter mentioned was, and still is, a domestic corporation.

10. That on March 28th, 1941, in the United States District Court for the Southern District of New York, a petition in involuntary bankruptcy was filed against the Graves-Quinn Corporation (hereinafter referred to as the "bankrupt"), praying that it be adjudged bankrupt, and thereafter and on June 19th, 1941, it was duly adjudicated bankrupt in such Court.

11. That thereafter and at a special meeting of the creditors of said bankrupt, certain of which creditors were in

existence at the time of preferential payment hereinafter more particularly complained of, duly called and held by Hon. Peter B. Olney, Referee in Bankruptcy, in charge of said proceedings, the plaintiff herein on the 14th day of July, 1941, was duly appointed Trustee in Bankruptcy, and [fol. 38] duly qualified and is now acting as such Trustee.

12. That on or about November 28th, 1940, and within one year prior to the filing of the petition in bankruptcy as aforesaid, the bankrupt above named transferred to the defendant herein the sum of $150,000.00.

13. That the transfer aforesaid was made while the said bankrupt was insolvent, or its insolvency imminent, with the intent of giving a preference to the defendant over other creditors of the corporation within the meaning of Section 15 of the Stock Corporation Law of the State of New York.

14. That at the time of the transfer referred to in the preceding paragraph, the defendant had notice or reasonable cause to believe that the payment of said sum of $150,000.00 as aforesaid would effect a preference.

15. That the aforesaid transfer was void and in violation of Section 15 of the Stock Corporation Law of the State of New York.

Wherefore, plaintiff demands judgment against the defendant in the sum of $150,000.00, together with interest thereon from November 28th, 1940, besides the costs and disbursements of this action.

M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York City.

[fol. 39] IN SUPREME COURT OF NEW YORK

AMENDED ANSWER, READ IN SUPPORT OF MOTION

[Same title]

Defendant, by Paul E. Mead, its attorney, for its amended answer to the complaint:

To the First Cause of Action:

I. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraphs numbered 1 and 3.

II. Denies each and every allegation of paragraph numbered 4 except that it admits that on or about November 27, 1940, Graves-Quinn Corporation drew and delivered to defendant a check on its account with defendant for $150,000.

III. Denies each and every allegation of paragraphs numbered 5 and 6.

IV. Denies each and every allegation of paragraph numbered 8 except that defendant admits it has not paid to plaintiff the said sum of $150,000 or any part thereof.

To the Second Cause of Action:

V. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs numbered 10 and 11.

VI. Denies each and every allegation of paragraph numbered 12 except that it admits that on or about November [fol. 40] 27, 1940 Graves-Quinn Corporation drew and delivered to defendant a check on its account with defendant for $150,000.

VII. Upon information and belief denies so much of paragraph numbered 13 as alleges that Graves-Quinn Corporation was insolvent or its insolvency imminent at the time of the alleged transfer and otherwise denies each and every allegation of said paragraph.

VIII. Denies each and every allegation of paragraphs numbered 14 and 15.

For a First Defense to Each of the Causes of Action Set Forth in the Complaint, Defendant Alleges:

IX. Upon information and belief that on or about the 14th day of September, 1940 Graves-Quinn Corporation entered into a certain War Department Contract No. W 6191 qm-131 with the United States of America for the construction by said corporation of certain housing projects in the States of Maine, Massachusetts and Rhode Island for a stated consideration of $1,008,800.

X. That thereafter said Graves-Quinn Corporation made application to defendant for assistance in financing such construction by making to it from time to time loans of money against payments to be received by said corporation from the United States as the work progressed.

XI. That defendant undertook to render such financial assistance, and commencing on October 10, 1940 defendant [fol. 41] from time to time loaned money to said Graves-Quinn Corporation evidenced by its promissory notes upon the promise of said corporation that all such notes outstanding at any of the times when payments were received by it from the United States should be thereupon fully paid and that such payment should be made without regard to the maturity dates of such notes.

XII. That on or about November 27, 1940 said Graves-Quinn Corporation received from the United States for work done pursuant to the aforesaid contract payment by check in the sum of $155,865.50.

XIII. That the check aforesaid was duly endorsed by said Graves-Quinn Corporation and thereafter and on November 27, 1940 was delivered to defendant, and on November 28, 1940 was credited to the account maintained by said Graves-Quinn Corporation with defendant.

XIV. That on November 28, 1940, when the aforesaid check was credited to the account of Graves-Quinn Corporation, defendant held four promissory notes made by said corporation aggregating the face amount of $150,000.

XV. That by their terms three of the said notes aggregating $100,000 were payable on demand, and one note for $50,000 payable on December 9, 1940.

XVI. That the aforesaid note for $50,000 was properly payable at the time Graves-Quinn Corporation received said payment of $155,865.50 from the United States by reason of the agreement made at the time defendant undertook to [fol. 42] make advances to Graves-Quinn Corporation in connection with the contract aforesaid that such advances should be repaid as and when said corporation was paid by the United States.

XVII. That on and after November 27, 1940 defendant had a lien and right of offset against the deposit balance of Graves-Quinn Corporation to the amount of $150,000.

XVIII. That on or about November 27, 1940 Graves-Quinn Corporation issued and delivered to defendant its check for $150,000 on its said account, by reason of which its said account was on November 28, 1940 debited in said amount and the liability of Graves-Quinn Corporation on the aforesaid notes aggregating the principal sum of $150,000 fully discharged.

XIX. That the said transaction constitutes the transfer and payment of which plaintiff complains.

XX. That the delivery and credit of the check for $155,865.50 as aforesaid and the payment of the said notes were in the normal and regular course of business as it had been carried on between Graves-Quinn Corporation and defendant prior to said transaction, and as such business continued to be carried on thereafter, whereby outstanding notes were retired as Graves-Quinn received payments from the United States pursuant to its said contract and new advances were made by defendant in anticipation of further payments thereafter to be received from the United States.

[fol. 43] For a Second Defense to Each of the Causes of Action Set Forth in the Complaint, Defendant Alleges:

XXI. Defendant repeats and realleges each of the allegations of paragraphs IX, X and XI.

XXII. That on or about the 20th day of November, 1940 Graves-Quinn Corporation for a valuable consideration executed and delivered to defendant as security to all existing and future loans made to it by defendant an assignment of all its right, title and interest in and to any and all sums of money then due or thereafter to become due under the

aforesaid contract. Copy of said assignment marked Exhibit A is annexed hereto and made a part hereof.

XXIII. The assignment aforesaid was duly approved by the Secretary of War and written notice of said assignment, together with true copies of the instrument of assignment were duly filed with the General Accounting Office, the contracting officer, the surety upon the bonds in connection with the contract aforesaid and the disbursing officer designated in such contract to make payment, all pursuant to the "Assignment of Claims Act of 1940."

XXIV. That as of November 18, 1940 there was payable to Graves-Quinn Corporation under the contract referred to in said assignment the sum of $155,865.50, and thereafter and prior to November 28, 1940 a check in said amount in favor of Graves-Quinn Corporation was issued and delivered to said corporation which by reason of the said [fol. 44] assignment received said check as the property of defendant.

XXV. That on November 27, 1940 said check for $155,865.50, duly endorsed, was delivered to defendant, and by it received in both the due and normal course of business and as assignee as aforesaid and out of the avails thereof defendant received the sum of $150,000 in discharge of the outstanding obligations of Graves-Quinn Corporation to defendant then due and payable.

XXVI. That said payment is the payment and transfer referred to in the complaint herein.

For a Third Partial Defense to Each of the Causes of Action Set Forth in the Complaint, Defendant Alleges:

XXVII. Repeats and realleges each of the allegations of paragraphs XXI-XXV, inclusive.

XXVIII. That after execution of the assignment aforesaid and, after there became due and payable to Graves-Quinn Corporation, pursuant to the contract referred to in said assignment, the sum of $155,865.50, defendant in reliance on said assignment loaned to said Graves-Quinn Corporation further sums of money evidenced by its demand promissory note for $40,000, bearing date November 20, 1940 and entered on the books of defendant on November 28, 1941.

XXIX. That the transfer and payment of $150,000 of which plaintiff complains included the sum of $40,000 to take up the said note.

[fol. 45] Wherefore, defendant demands judgment that the complaint be dismissed with costs.

Paul E. Mead, Attorney for Defendant, Office & P. O. Address, One Wall Street, Borough of Manhattan, City of New York.

In Supreme Court of New York

Affidavit of David Morgulas, Read in Opposition to Motion

[Same Title]

State of New York,
County of New York, ss.:

David Morgulas, being duly sworn, deposes and says:

I am a member of the firm of M. Carl Levine, Morgulas & Foreman, the attorneys for the plaintiff herein.

I am familiar with the facts herein, having examined the records of the bankrupt at great length and having also commenced an examination before trial of Orville E. Miles, the Assistant Secretary of the Irving Trust Company, who makes the moving affidavit on the instant motion.

The statements which I will hereinafter make are derived both from my examination of the bankrupt's affairs as well as from my examination of Mr. Miles.

[fol. 46] The instant motion is made to dismiss the first cause of action, upon the ground that the defenses thereto are sufficient as a matter of law and are founded upon facts established by documentary evidence or official record. Interspersed with many of the conceded facts, we find both argumentative statements and statements which are decidedly not the fact, and this applies to some of the most important points at issue, namely, the dates of the deliveries of the checks for $150,000 and $155,865.50, as well as the facts relating to the alleged assignment. In order to clarify the issues, I believe it is necessary to first briefly consider the pleadings.

The first cause of action, which is the subject of the instant motion, seeks to set aside a preferential payment made

on November 28th, 1940 in the amount of $150,000 for and on account of an antecedent debt. There are three defenses to the first cause of action, the third of which defense is labelled a "partial defense".

The first defense is to the effect that the bankrupt made application to the defendant for assistance in financing the performance of a government contract for the construction of certain housing projects in the New England area, and that the defendant undertook to render such assistance, commencing on October 10th, 1940, and thereafter loaned money to the bankrupt from time to time, and that these monies were to be repaid as and when the bankrupt received monies from the United States on account of the aforesaid contract, without regard to the maturity dates.

Defendant then alleges that on November 27th, 1940, Graves-Quinn received a check from the Government in the [fol. 47] sum of $155,865.50, and that the check was endorsed and delivered by Graves-Quinn to the defendant on November 27th, 1940, and on November 28th, 1940 it was credited to the account maintained by Graves-Quinn with the defendant.

The defendant then goes on to state that on November 28th, 1940, there were outstanding $100,000 of promissory notes, payable on demand, and one note payable on December 9th, 1940 for $50,000. Paragraph 16 of the answer then alleges that the aforesaid $50,000 note was properly payable by reason of the alleged agreement that the bank was to receive prepayment of all amounts outstanding as and when payments were received from the Government.

There is a further allegation that on November 27th, Graves-Quinn delivered to the defendant its check for $150,000 by reason of which its account was, on November 28th, credited in a similar amount.

The second defense is to the effect that on November 20th, 1940, Graves-Quinn delivered to the defendant, "as security for all existing and future loans made to it by the defendant, an assignment of all its right, title and interest in and to the monies then due or to become due from the Government," and that said assignment was duly approved by the Secretary of War. That as of November 18th, 1940, there was payable to Graves-Quinn, under the aforesaid contract referred to in the assignment, the sum of $155,865.50, and that said check was on November 27th delivered to the defendant and received by it in the normal course

of business and as assignee, and that the defendant [fol. 48] received from the said check $150,000 in discharge of outstanding obligations.

The third partial defense is to the effect that after the execution of the aforesaid assignment, the defendant, in reliance on the said assignment, loaned $40,000 to the bankrupt on November 20th, 1940. The defendant then alleges that the transfer and payment of the $150,000 of which the plaintiff complains included the sum of $40,000 to take up the aforesaid note.

Of all the three defenses, this last so-called "partial" defense is the one which is most viciously false, for, it will hereinafter be disclosed that it appears from the defendant's own records, that this alleged assignment was not delivered to it until November 22nd, 1940, so that the loan of $40,000 could not have conceivably been issued in reliance on the assignment on November 20th, 1940. *This, of course, entirely overlooks the fact that the assignment was not effective until it was approved by the Secretary of War on December 5, 1940, and the defendant both realized that fact and its records so indicate.* But regardless of whether the assignment was effective as of the date of delivery (November 22nd), or on the date it was approved by the Secretary of War (December 5th) it certainly was not effective on November 20th, 1940, two days before it was delivered.

Defendant has very conveniently taken the date of the assignment, which is November 20th, and assumed that it was delivered on that date, but we will hereinafter show that it was not delivered on that day, and that, in fact, Mr. Miles took a plane trip to Boston in order to obtain the assignment on November 22nd.

[fol. 49] It is necessary, however, to point out some of the more glaring inaccuracies in the moving affidavit, which go to the very foundation of this motion.

It is stated, to begin with, that there was some agreement on the part of the defendant to finance the job, and to receive all the monies coming due from the Government in repayment. That is not the fact, and the defendant's own records so indicate.

We have been examining the bank before trial, and during the course of examination there has been offered in evidence certain memoranda, made by Mr. Miles, the Assistant Secretary of the bank in connection with the Graves-

Quinn account. Thus, Exhibit VI shows the memorandum of Mr. Miles for October 10th, 1940, which states the following:

> "Messrs. Graves and Quinn called and borrowed $30,000 on a one month note. On the 15th of October they will requisition from $150 200,000 on an Army job recently begun. When this requisition is received our note is to be anticipated."

On October 24th, 1940, it appears that Messrs. Graves and Quinn called on the bank and borrowed $40,000 for ten days. Again, the bank's records fail to indicate any understanding to finance the job, and, on the contrary, it then appeared to the bank that it would be repaid within a week.

Under date of October 31st, we find this illuminating memorandum made by Mr. Miles, when Graves-Quinn came [fol. 50] to the bank and asked for an additional $30,000:

> "Mr. Graves telephoned from Boston. A requisition was approved as of October 15, amounting to $97,000. After the retainage the net amount coming to Graves-Quinn will be $87,314. This check was expected yesterday but was delayed. They have been promised that it will definitely be in their hands today and it should, therefore, be received by us for deposit tomorrow morning.
>
> In the meantime they require approximately $30,000 further advance in order to provide payroll money today. They will send a note air mail at once which should reach us this afternoon. Upon receipt of the check for $87,000, present loans amounting to $70,000 will be anticipated."

We respectfully point out that there is not the slightest suggestion of any agreement to finance anybody, nor is there the slightest suggestion of an assignment of any monies.

In fact, it was not until November 15th, 1940, that the first thought of an assignment was broached, and then there was actually owing to the bank about $85,000, and it clearly appeared that unless more money were loaned to carry the bankrupt over the period when it would receive the large

payment from the Government, disaster to the bank would follow.

Nor was it the purpose of this assignment to secure defendant for advances to be made as Mr. Miles states in his affidavit. It appears from Exhibit X, introduced on the ex- [fol. 51] amination before trial, being Mr. Miles' memorandum of November 27th, as follows:

> "Messrs. Cobb, Petersen, Keenan and the writer discussed this case and arrived at the decision that upon receipt of the check covering November 18th requisition, which would repay company's indebtedness to us, we should inform them of our unwillingness to make any further advances unless the surety companies would give us some satisfactory undertaking not to come between us and payments, due Graves-Quinn under the contract, which have been assigned to us."

In other words, it was the obvious purpose to obtain this assignment, grab whatever monies the bank could to repay the loans, and then refuse to make any more advances unless the Standard Accident Insurance Company would give satisfactory assurances to the bank that it would take a back seat, or in other words, suffer the loss.

Thus, it is clear that the assignment was not obtained in the usual and customary course of the business, but on the contrary, the assignment was part of a clever scheme whereby the bank intended to place itself in a position to grab the monies from the Government and then refuse to advance any more monies.

Thus, the very purpose of the Assignment of Claims Act was to be frustrated.

It is to be borne in mind that prior to October 9th, 1940, assignments of claims against the Government were illegal. It was only by virtue of the Assignment of Claims Act, ap- [fol. 52] proved by the President of the United States on October 9th, 1940, a copy of which is annexed hereto, that assignments were permitted. Its purpose was to facilitate the making of advances by banks on the strength of assignments which were approved by the Secretary of War.

It is therefore highly significant to note that it was the obvious intention of the bank not to make any advances once the War Department had approved the assignment. Further, it appears from the notations of November 27th,

1940 that the bank did not even consider asking for approval of the assignment until it had grabbed the Government check and could then say to the Surety Companies, subordinate your position to ours, or let Graves-Quinn go to pot.

That is a far cry from Mr. Miles' present statement in his affidavit that the purpose of the assignment was to secure the defendant for advances to be made.

The only part of the statement that has any accuracy is that the assignment was to secure the defendant for advances already made, something which is directly prohibited by the Bankruptcy Act.

As to when the Government check for $155,865.50 and the Graves-Quinn check for $150,000 were delivered to the bank, we have also but to look at Mr. Miles' memorandum of November 28th, which reads in part as follows:

> "Although Mr. Graves informed us by telephone at 4:45 yesterday afternoon that the Government check had been received and would be mailed shortly thereafter, the check had not arrived in this morning's mail. [fol. 53] The Graves-Quinn office in New York was in receipt of a letter from Mr. Graves, written yesterday evening, stating that the check had been mailed to us. Shortly before 1 o'clock in the afternoon Mr. Graves arrived at our office. In view of the short time available to the company to arrange for the payroll which needed to be prepared this afternoon, it was decided to disclose our position to Mr. Graves. I informed him that although we had sent a special messenger to the Post Office at various times, we had been unable to obtain the check. When I explained our unwillingness to make additional loans without some form of guarantee from the surety companies and that it would be necessary to get in touch with them promptly, Mr. Graves was most anxious that we receive our check before the call was made. About 2 o'clock the check arrived. The envelope bore Boston postmark '10 P. M.' yesterday."

So, to begin with, it is clear that the bank did not receive either check until November 28th, 1940. So great was the bank's fear and anxiety that, as Mr. Miles' memorandum indicates, the bank sent a special messenger to the Post

Office at various times in an effort to locate the check. Evidently they felt that something might happen before the check came into their hands on the 28th, in the regular and normal course.

This is a far cry from the bank's statement in its answer that everything was done in the normal and usual business course. It is obvious that the bank realized that there was [fol. 54] trouble, and that it not only sent its representatives to Boston by plane on November 22nd, 1940 to make assurance doubly sure, but it even could not trust the delivery of the check to the mail-carrier.

How, then, can the bank say that it had no cause to believe that the Graves-Quinn Corporation was insolvent, or how can it state that the check was delivered to it on the 27th? While Graves-Quinn may have mailed the checks from Boston on November 27th, the checks were not received by the defendant until November 28th, 1940. That the bank will and must concede.

As a matter of fact, their own records indicate that the deposit of both the Government check and the check of Graves-Quinn for $150,000 was made on November 28th. We are submitting herewith a photostatic copy of the bank statement for November, 1940, which will show the deposit of both checks on November 28th.

It is also highly significant that the same statement shows an overdraft on November 28th, 1940 of $41,550 and an overdraft on the 29th of November, 1940, of $17,867.47.

Certainly, if nothing else, all these matters must give rise to the inference that the bank certainly had some reason to be put on notice that everything was not "right" with Graves-Quinn, when it applied the $150,000 to the past indebtedness.

The defendant would give this Court the impression that the assignment was made on November 20th, 1940, and that the assignment was effective as of that date, and that the bank loaned any monies on the strength thereof. To begin with, the bank was fully aware of the fact that the as- [fol. 55] signment had no validity unless the consent of the Secretary of War was obtained. Furthermore, at the very time the question of the assignment was first broached on November 15th, 1940, we find the following memorandum

made by Mr. Miles as to what occurred on November 15th, 1940:

"Assistance will be required to meet next week's payroll, in addition to which, if agreeable to us, they could use $100,000 to discount material bills.

"They are willing to assign the contract to us but as it is dated prior to the date of the Act authorizing the assignment of Government contracts the consent of the Government will be required. This probably would take some time; furthermore, since the job is for a fixed amount it does not seem likely that an assignment of the contract would protect us against a loss on the contract. It seems likely that such protection could be afforded only by a subordination of the rights of the surety company. We are now looking into this question further.

"As a partial offset to the $60,000 required for the payroll yesterday, we are today putting on a demand note for $30,000 bringing total loans to $80,000. We have agreed to loan an additional $30,000 on next Wednesday for payroll purposes. *The entire indebtedness should be retired two or three days after that date, when a check for the November 18th requisition should be received.*"

Mr. Miles' memorandum made on November 26th, 1940, clearly indicates the defendant's fear that something might [fol. 56] happen to the payment then about to be made by the Government to Graves-Quinn. It also clearly shows that they refused to use the assignment lest it cause a delay. The memorandum made under that date by Mr. Miles reads in part as follows:

"Upon learning by telephone from Mr. Graves that the amount to be allowed by the Government for the payment as of November 18, probably would be less than half the sum that Graves-Quinn previously had estimated, and as we had not received the executed assignments of payments to be due under the contract, the writer went to Boston by plane at noon on Friday, November 22. The purpose of the trip was to:

1. Obtain the signed assignments.
2. Investigate the discrepancy between the estimated current payment and the amount actually allowed.

3. Ascertain the present status, and, if possible, to estimate the financial outcome of the job.

"The assignments were found to have been already executed and were delivered to me shortly after arrival. Any delay in their completion had been occasioned by the pressure under which Messrs. Graves and Quinn were working to attend to many details constantly arising in connection with the job. As there appeared to be [fol. 57] no emergency that would forestall the orderly payment of the present requisition, amounting to $155,000, net, it was decided to refrain from filing the assignment immediately as it was feared such action might further delay issuance of the check."

It was only after defendant felt certain that the payment of $155,000 was in the mail that the defendant finally decided to request the Government's approval of the assignment, and Mr. Miles' memorandum under date of November 27th bears that out, viz:

"Mr. Cobb talked with Mr. Kidd on the telephone and it was decided to write a letter requesting the approval of the War Department to the filing of the assignment. It was felt that by this time the filing of such a request would not interfere with the issuance of the check in payment of the November 18th requisition, and in the event the check is not turned over to us and our loan not liquidated, the assignment would cover further amounts due by the War Department under the contract."

As a matter of fact, the bank did refuse to loan any further monies until it had obtained a commitment from the Standard Accident Insurance Company that it would do nothing to interfere with the contract, witness the following:

[fol. 58] "December 6, 1940.

Irving Trust Company
Park Avenue at 42nd Street
New York, N. Y.

Subject: BO-385315—Contract No. W-6101-qm. 131, dated September 14, 1940 between the United States of America and Graves-Quinn Corporation.

GENTLEMEN:

As you know, our company is surety on bonds of Graves-Quinn Corporation in connection with the above contract.

In consideration of such loans as have heretofore or which hereafter may be made by you to Graves-Quinn Corporation, we agree that we, acting alone or with others, will commit no act in anywise to interfere with the performance by Graves-Quinn Corporation of work to be done under said contract until such time as your loans are fully repaid. We do hereby further agree that in the event any claim or claims should be made upon us under our bonds in connection with said contract by any materialmen, sub-contractors or laborers, we will take no act in anywise to interfere with the payments from the United States under said contract until your loans are fully paid.

We shall have no obligation hereunder unless with respect to each loan you shall deliver to us a letter [fol. 59] signed by Graves-Quinn Corporation by its President and Treasurer in the form attached.

Very truly yours, Standard Accident Insurance Company, by C. W. Kuhn.

Approved: Graves-Quinn Corp., by Wm. T. Quinn, Pres., Lewis W. Graves, Treas.

on side: Approved Wm. T. Quinn. Approved Lewis W. Graves."

"December 6, 1940.

The Irving Trust Company,
Park Avenue at 42nd Street,
New York, N. Y. and
Standard Accident Insurance Company,
111 John Street,
New York, N. Y.

Subject: BO-385315—Contract No. W 610f qm-131, dated September 14, 1940 between the United States of America and Graves-Quinn Corporation.

GENTLEMEN:

We are applying to the Irving Trust Company for a loan in the sum of $10,000 and we agree that the pro-

ceeds of this loan will be held by us in trust for the pay-
[fol. 60] ment of obligations arising in connection with the performance of the above described contract.

Very truly yours, Graves-Quinn Corporation, by Wm. T. Quinn, President.

Attest: —— ——, Treasurer.

We join in the above: William T. Quinn, Lewis W. Graves."

In fact, the Secretary of War did not approve the assignment until December 5th. It is therefore elementary that all the defendant actually used the assignment for was to repay itself for the monies advanced prior to November 28th. Unless it obtained the aforesaid letter from the Standard Accident Insurance Company, the defendant would not and did not intend to lend any money on the assignment.

I respectfully submit that there is no merit in the instant motion and that it should be denied.

David Morgulas.

(Sworn to before Lillian M. Fox October 16, 1942.)

Affidavit of Plaintiff

Bank Statement

(Opposite)

(Here follow 2 photolithographs, side folios 61, 61a)

IRVING TRUST COMPANY
NEW YORK

Graves-Quinn Corporation,
Grand Central Terminal,
New York, N. Y.

L.O. Room 1724.

Nov. 1940 From Line.

PLEASE EXAMINE AT ONCE
IF NO EXCEPTIONS ARE REPORTED BY THE 10TH OF THE FOLLOWING MONTH, ACCOUNT WILL BE CONSIDERED CORRECT
NOTIFY US PROMPTLY OF ANY DELAY IN RECEIPT OF STATEMENT AND VOUCHERS

	DEBITS		CREDITS		BALANCE	
				BALANCE FORWARD →		2059.28-
			1 87,314.06	✓		
			1 32000.00		1	
					1 90254.78	
1	70000.00-	32000.00-				
1	1661.64-		1 cc 35000.00	✓		
			1 51.37		1 21644.51	
2	164.40-				2 21480.11	
4	390.87 LSI				4 21089.24	
4	1000.00-	23.25-			4 20065.99	
6	2336.08 LSI				6 17729.91	
6	450.00-				6 17279.91	
6	12679.71-				6 4600.20	
7	320-	74.88-				
7	176.89-	649.03-				
7	200.00-	216.00-			7 3280.20	
7	29736.93-		7 cc 49800.00	✓	7 23343.67	
8	225.00-	48.00-				
8	60.00-				8 23010.67	
8	2087.76-		89808.88	✓	8 110731.79	
9	501.30-	50.37-				
9	850.00-				9 109330.12	
10	132.60-	226.62-			10 108970.90	
13	8000.00-	750.00-				
13	100.00-				13 100120.90	
13	35052.50-				13 65068.40	
14	100.00-	7400.00-			14 57568.40	
14	13278.63-	46448.72-				
14	600.00-				14 2758.95	
18	500.00-	174.00-				
18	68.00-	928.00-			18 8928.95	
18	239.27-		18 cc 30000.00	✓	18 18676.78	
18	184.12-				18 18492.66	
18	175.00-				18 18317.66	
19	2970.20 LSI		18 cc 30000.00	✓	18	
					19 48317.66	
					19 45347.46	

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

New York, N. Y.

L.O. Room 1714. From Line.

PLEASE EXAMINE AT ONCE

IF NO EXCEPTIONS ARE REPORTED BY THE 10TH OF THE FOLLOWING MONTH, ACCOUNT WILL BE CONSIDERED CORRECT. NOTIFY US PROMPTLY OF ANY DELAY IN RECEIPT OF STATEMENT AND VOUCHERS.

	DEBITS		CREDITS		BALANCE	
				BALANCE FORWARD		[redacted]9,059.28-
			1	87,314.06		
			1	3200.00	1	
					1	90,254.78*
1	70,000.00-	32,000.00-				
1	1,661.84-		1 CC	35000.00		
			1	5137	1	21,644.51*
2	164.40-				2	21,480.11*
4	390.87 LSI				4	21,089.24*
4	1,000.00-	23.25-			4	20,065.99*
6	2,336.08 LSI				6	17,729.91*
6	450.00-				6	17,279.91*
6	12,679.71-				6	4,600.20*
7	3.20-	7.88-				
7	176.89-	649.03-				
7	200.00-	216.00-			7	3,280.20*
7	29,736.53-		7 CC	49,800.00	7	23,343.67*
8	225.00-	48.00-				
8	60.00-				8	23,010.67*
8	2,087.76-			89,808.88	8	110,731.79*
9	501.30-	50.37-				
9	850.00-				9	109,330.12*
12	132.60-	226.62-			12	108,970.90*
13	8,000.00-	750.00-				
13	100.00-				13	100,120.90*
13	35,052.50-				13	65,068.40*
14	100.00-	7,400.00-			14	57,568.40*
14	13,278.63-	46,448.72-				
14	600.00-				14	2,758.95*
15	5,000.00-	174.00-				
15	68.00-	928.00-			15	8,928.95*
15	239.27-		15 CC	30000.00	15	18,676.78*
16	184.12-				16	18,492.66*
16	175.00-				16	18,317.66*
19	2,970.20 LSI		18 CC	30,000.00	18	
					18	48,317.66*
					19	45,347.46*

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

[redacted]

404

IRVING TRUST COMPANY
NEW YORK

Gravel-Quinn Corpation,
Grand Central Terminal,
New York, N. Y.

L O. Room 1723 Nov. 1940 b

NOV 20 1940

PLEASE EXAMINE AT ONCE

[illegible] WILL BE CONSIDERED BY THE 15th OF THE FOLLOWING MONTH ACCOUNT WILL BE CONSIDERED CORRECT
[illegible] PROMPTLY OF ANY DELAY IN RECEIPT OF STATEMENT AND VOUCHERS

	DEBITS		CREDITS		BALANCE	
			BALANCE FORWARD			
28	5345.08				28	40,002.40
30	44624.40-				30	4,622.00
28	8001.94				28	12,623.94
28	2756.99-		28	35.00	28	15345.03
28	3492.23				28	18,838.16
28	1000.00-	1000.00-				
28	457.04-	250.00-			28	21,545.20
28	2500.00-	9000.00-			28	
					28	33045.20
26	180.00-	268.58-				
26	361.62-	48.60-				
26	700.00-	5000.00-				
26	100.00-				26	39,704.00
26	1000.00-				26	40,704.00
27	108.00-				27	40,812.00
28	102.00-	2223-				
28	26.00-	1577.00-				
28	209.77-				28	41,550.00
28	93.75-	26.46-				
28	4726.20-	17389.06-				
28	150000.00-		28	155865.50		
			28 cc	40000.00		
			28	62.50	28	13,867.47
29	4000.00-				29	17,867.47
29	3219.94-	19163.81-				
29	297.98-		29 cc	82000.00	29	9,801.00
30	46.00-	6000.00-				
30	2000.00-	116.72-				
30	7000.00-	3000.00-			30	8362.82

Overdraft

[fol. 62] ASSIGNMENT OF CLAIMS UNDER CONTRACTS

(Public—No. 811—76th Congress.)

(Chapter 779—3d Session.)

(H. R. 10464.)

AN ACT

To Assist in the National-Defense Program by Amending Sections 3477 and 3737 of the Revised Statutes to Permit the Assignment of Claims Under Public Contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 3477 and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of [fol. 63] 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

"3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment

together with a true copy of the instrument of assignment with:

"(a) The General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not [fol. 64] be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

Sec. 2. This Act may be cited as the "Assignment of Claims Act of 1940".

Approved, October 9, 1940.

R. S. 3737—Sec. 15 of Public Contracts—U. S. C. A.

No transfer of contract—No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned.

R. S. 3477—Sec. 203—Title 31, Money and Finance—U. S. C. A.

All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be absolutely null and void, unless they

are fully made—after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

[fol. 65] In Supreme Court of New York

Reply Affidavit of William A. Onderdonk, Read in Support of Motion

[Same Title]

State of New York,
County of New York, ss.:

William A. Onderdonk, being duly sworn, says: I have read the answering affidavit on behalf of plaintiff. It deals largely with what is irrelevant on this motion.

We are not asking the court to determine either the issue of solvency raised by the pleadings, or the issue of the knowledge of defendant at the time its debt was paid. This debt was paid as debts similarly contracted by Graves-Quinn both before and after were paid, viz., out of the Government payments for work which defendant had financed.

For two or three months after the payment complained of and until the contract was completed, defendant continued its advances, Graves-Quinn continued performance of the contract and the advances were repaid from time to time in precisely the same way—out of Government payments.

On March 28, 1941 the Standard Accident Insurance Company, which was enough interested in the financial assistance of defendant to write the letter of December 6, 1940 (opposing affidavit, pp. 11, 12) procured the filing of a petition in bankruptcy. The trustee is its selection and its attorneys are his attorneys.

The first cause of action alleges that the payment complained of was a preferential transfer under the Bankruptcy Act (Section 60). One of the essentials of a preferential transfer is that the transfer occur within four months of the [fol. 66] filing of the petition. The sole issue before the court on this motion is whether the transfer occurred within this four months' period. If it did not, the transfer was not

preferential and this is so even if Graves-Quinn was hopelessly insolvent at the time and defendant knew all about it.

The issue raised by defendant in its motion involves questions of law principally, if not wholly, which will be thoroughly treated in the brief to be handed up on the argument.

We can only construe the irrelevancies in the opposing affidavit as designed to confuse the single issue raised and to create an atmosphere inimical to defendant in the consideration of that issue. Else why the effort to discredit defendant when that objective has no bearing whatever on the one question whether the transfer was made less than four months or more than four months before the filing of the petition. Plaintiff apparently thinks the court may be misled into assumig that Graves-Quinn was insolvent at the time of the transfer (there is no evidence of it in the record), and inferring that defendant had knowledge of the assumed insolvency (there is no basis for the inference) and thereupon deny the motion. To deny the motion on that basis would be to by-pass the motion made by defendant. We are asking the court to find on undisputed facts that the transfer was made more than four months prior to the filing of the petition. If that conclusion is reached, the first cause of action must be dismissed regardless of the facts as to the solvency of Graves-Quinn and the knowledge of defendant.

Despite the irrelevance of most of the opposing affidavit defendant is not content that the misstatements of fact [fol. 67] should go wholly unnoted. And what is here said in the interest of a true picture will be taken mostly from the documents.

There is nothing sinister about the assignment of Graves-Quinn to defendant. In a memo of Mr. Miles dated November 7, 1940, which was marked by plaintiff upon his examination of defendant before trial as Ex. VII, this reference was made to an assignment:

> "Depending upon the amount they are likely to require, I told Mr. Graves we might wish to have the contract assigned to us. He said they would have no objection to this procedure if we desired."

In a memo dated November 15, 1940 (Pltf. Ex. VIII) Mr. Miles wrote:

"After obtaining Mr. Van. Doren's approval, informed Mr. Graves that we are agreeable to lending the company an additional $30,000 at present and also $40,000 for next week's payroll.

"They are to assign to us payments to become due under the contracts covering the Government job on which they are engaged. Since the asignment of the contract requires the approval of Government authorities, which will probably take some time, he was told that we are agreeable to mak ing the loans with the understanding that Graves-Quinn will execute the assignment, approval of the Government to be obtained later. Mr. Kidd is drawing up the necessary papers."

[fol. 68] The assignment was executed on November 20th and as Mr. Miles says in his moving affidavit (p. 2) was received by him on behalf of defendant on November 22, 1940. We assume for the purposes of this motion at least that it was not effective before delivery. In what he has to say about the $40,000 loan (p. 4) Mr. Morgulas overlooks the fact that at the time of the assignment the notes outstanding aggregated $110,000 (Ex. A, attached to moving papers). As appears from both the affidavit of Mr. Miles (p. 2) and the statement of the Graves-Quinn account for November 1940 (attached to the opposing affidavit) the advances to Graves-Quinn between November 20th and November 28th were made by a constantly increasing overdraft. On November 28th the $40,000 note went on the books, thereby substantially wiping out the accumulated overdraft. This $40,000 advance was thus not made on November 20th, though the overdraft started on that day.

Mr. Morgulas makes (pp. 5, 6) some mysterious references to the financing of the job and to the purpose of the assignment. Obviously the bank was making frequent advances to finance the work, being repaid out of payment by the Government and then loaning again. Defendant was repaid not only the $150,000 of which plaintiff is complaining, but also several hundred thousand dollars additional (Ex. A, attached to the moving papers). When the financing was completed and the debts repaid, Graves-Quinn asked for and received a release of the assignment (Exs. D and E, attached to the moving papers).

The statement in the opposing affidavit that the bank refused after being repaid the $150,000 to make any further

advances until the letter of the surety, dated December 6, [fol. 69] 1940, is erroneous. An advance of $82,000 was made on November 29, 1940 (Ex. A, attached to moving papers.) This loan was made after the Boston trip was made by Mr. Miles, to which the opposing affidavit refers (p. 10). We add to the quotation in the opposing affidavit from the memo of November 26, 1940 (Pltf. Ex. X). Referring to the discrepancy between the requisition of Graves-Quinn of November 18, 1940 and the amount certified by the Government, Mr. Miles wrote:

"Considerable time was spent in checking the accuracy of Graves-Quinn's estimated requisition. Most of two days was taken in inspecting in detail seven (out of a total of twelve) sites where work is being done. Calculations based on these inspections lead me to conclude that the discrepancy (in total about $230,000) was due to:

1. An over estimate by Graves-Quinn of about $90,000, due to:

a. Lack of sufficient detail in some cases of the actual status of the work on certain sites.

b. Rain for three or four days at the end of the period covered, and after their estimate was made. This prevented the installation of certain items, such as furnaces, with a high dollar value in relation to cost of putting in place. (All of this material was available at the sites.)

2. Under estimate of the Government of about $140,000, due to:

[fol. 70] a. The employment of a system of estimating completed work, which is detrimental to the contractor in the early stages of erection (which is subsequently corrected as the building nears completion).

b. Ineptitude of many of the civilian inspectors employed by the Government and reluctance of their superiors to revise their estimates upward.

c. The fact that at the time this estimate was being made, Mr. Quinn was for three days engaged in an inspection tour with Major Richards and, thus, pre-

vented from going over the estimates with the inspectors who made them on the outlying jobs.

It is notable that for the Boston land forts, where a majority of the larger buildings are practically complete and where Mr. Quinn was able to check the figures with the individual inspectors, the discrepancy is negligible.

Major Richards, Quartermaster-General in charge of all construction in the New England area, stated that at present he is satisfied with the progress of the job and that the only thing that could stop payments being made would be the declaration by the Government that the contractor is in default.

As to the probable financial outcome of the job it is difficult to arrive at a definite conclusion because of the lack of sufficient detailed information relative to costs actually incurred to date and the exact amount of work yet to be completed. Because of the pressure for [fol. 71] the rapid completion of the job, which is a large one for Graves-Quinn they have omitted the maintenance of certain records, such as, job cost analysis. It is evident that the organization is inadequate in respect to the preparation of records that would be useful in a financial appraisal of the job. They are now willing to take on an accountant to be suggested by us but it is probably too late for such a step to be very helpful."

It is apparent that defendant was well within its rights in obtaining the assignment which an amendment in the law had made possible. It is apparent also that defendant was entitled to make the assignment effective by clarifying the relation of the surety to the contract.

The Government retained 10% of each amount certified as earned. There was a lag in payments after certification of the amount earned. The Government method of "estimating completed work" was not favorable to Graves-Quinn. The going was thereby made difficult for Graves-Quinn. But the more the facts are known the less excuse there appears for this suit. With the knowledge gained from a thorough examination of all the available records it is my belief that the action has no merit. We are not, however, on this motion trying all the issues raised by the plead-

ings. We are concerned with only one. The court is asked to determine if as matter of law the transfer complained of did not occur more than four months before the filing of the petition.

Wm. A. Onderdonk.

(Sworn to before Adam N. Keppler, October 22, 1942.)

[fol. 72] IN SUPREME COURT OF NEW YORK

REPLY AFFIDAVIT OF DAVID MORGULAS, READ IN OPPOSITION TO MOTION

[Same title]

STATE OF NEW YORK,
County of New York, ss.:

DAVID MORGULAS, being duly sworn, deposes and says:

I am a member of the firm of M. Carl Levine, Morgulas & Foreman, the attorneys for the plaintiff herein.

I make this affidavit in reply to the second affidavit of William A. Onderdonk, dated October 22nd, 1942.

For the first time, it appears from that affidavit that the sole question raised is whether "as a matter of law the transfer complained of did not occur more than four months before the filing of the petition".

It appears from Mr. Onderdonk's affidavit that almost sole reliance is placed on the delivery of the assignment to the Bank on November 22nd, 1940. It therefore becomes of the utmost importance for me to state the following facts:

The Standard Accident Insurance Company furnished the payment and performance bond required by the United States Government upon award of the New England contract to the Graves-Quinn Corporation. The assignment to the defendant bank dealt with the monies due and to become due on this New England contract. At the time Graves-Quinn Corporation obtained the Government contract, and under date of October 2nd, 1940, it executed an agreement of assignment and indemnity to the Standard

[fol. 73] Accident Insurance Company, which reads as follows:

"In further consideration of the execution of the said bond, the undersigned does hereby agree, as of this date, that the said Standard Accident Insurance Company shall, as surety on said bond, be subrogated to all rights, privileges and properties of the undersigned as principal and otherwise in said contract, and does hereby assign, transfer and convey to said Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable at the time of such breach or default, or that may thereafter become due and payable to said undersigned on account of said contract, or on account of extra work and materials supplied in connection therewith, hereby agreeing that all such moneys, and the proceeds of such payments and properties, shall be the sole property of the said Standard Accident Insurance Company, and to be by it credited upon any loan, cost, damage, charge and expense sustained, or incurred by it as above under its bond of suretyship."

A copy of the application for the contract bond and the agreement incorporating the aforesaid assignment is annexed hereto, marked Exhibit "A" and respectfully made a part hereof.

It will also be undisputed that many subcontractors were unpaid on November 20th. It is also undisputed that the Standard Accident Insurance Company, on completion of [fol. 74] the job actually paid over $300,000.00, in discharge of claims of various creditors of Graves-Quinn Corporation and its obligation on the aforesaid performance bond.

The aforesaid facts are most vital in considering the issues raised in the various moving affidavits, as well as in the matters referred to in the memorandum of counsel for the defendant.

David Morgulas.

(Sworn to before George R. Hall, October 27, 1942.)

EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF DAVID MORGULAS, READ IN OPPOSITION TO MOTION

(Opposite)

(Here follow 4 photolithographs, side folios 75, 75a, 75b, 75c)

10-28

EXHIBIT "A"

Agency _____ Bond No. 29-[illegible]

Standard Accident Insurance Company

DETROIT, MICHIGAN

APPLICATION FOR CONTRACT OR BID BOND

There should accompany this application: FINANCIAL STATEMENT, COPY OF CONTRACT AND SPECIFICATIONS, or in case of a bid bond; COPY OF ADVERTISEMENT and Instructions to Bidders.

1. Full Name of Applicant Grumman-Quinn Corporation
2. Business Address (street, city and state) Grand Central Terminal Bldg., New York, N. Y.
3. Amount of Bond: Proposal $ _____ Contract $ $500,000.00 Maintenance $ _____ Penal $ _____
4. To Whom Given U. S. A. (Give full name and business address. If a corporation, state corporate title)
5. Nature of Contract Rehabilitation of various forts located at Portland, Maine; Boston, Massachusetts; Narragansett Bay & Providence, Rhode Island
6. Name and Address of Architect or Engineer in Charge
7. Contract Price $1,000,000.00
8. Other Bidders on above Contract, including Highest and Lowest: IMPORTANT. (If a bid bond, give amount of applicant's bid)

NAME	ADDRESS	AMOUNT OF BID

9. Date work is to be commenced _____ Date to be completed _____
10. Penalty for non-completion on time $ _____ Premium if completed sooner $ _____
11. Payments, when and how made _____ Percentages retained: _____
12. Is this a min hour contract? _____ Number of man hours? _____
13. Are payments made in cash? _____ If not, by what method _____
14. If payments are in bonds, warrants, or other securities, advise fully what arrangements made for disposing of same _____
15. Will bond continue in force after construction is completed, to cover maintenance or repairs?
Nature: _____ For what period?
16. State which portion, if any, of work is guaranteed after completion and value of same $ _____
17. State nature and amount of the work to be sub-let _____
18. Will sub-contractors be required to give corporate bonds?
19. What is the estimated cost of work (by Architect or Engineer)?
20. What is your estimate of the cost of work to you?
21. With what bank have you arranged a loan for the purpose of handling this contract?

SPECIFICATIONS, or in case of a bid bond; COPY OF ADVERTISEMENT and Instructions to Bidders.

1. Full Name of Applicant Stevens-Salem Corporation

2. Business Address (street, city and state) Grand Central Terminal Bldg., New York, N. Y.

3. Amount of Bond: Proposal $ Contract $ Maintenance $ Penal $

4. To Whom Given U. S. A.
(Give full name and business address. If a corporation, state corporate title)

5. Nature of Contract Rehabilitation of various forts located at Portland, Maine; Boston, Massachusetts; Narragansett Bay & Providence, Rhode Island

6. Name and Address of Architect or Engineer in Charge

7. Contract Price $1,009,898.00

8. Other Bidders on above Contract, including Highest and Lowest: IMPORTANT.
(If a bid bond, give amount of applicant's bid)

NAME	ADDRESS	AMOUNT OF BID

9. Date work is to be commenced Date to be completed

10. Penalty for non-completion on time $ Premium if completed sooner $

11. Payments, when and how made Percentages retained:

12. Is this a min hour contract? Number of man hours?

13. Are payments made in cash? If not, by what method

14. If payments are in bonds, warrants, or other securities, advise fully what arrangements made for disposing of same

15. Will bond continue in force after construction is completed, to cover maintenance or repairs?
Nature: For what period?

16. State which portion, if any, of work is guaranteed after completion and value of same $

17. State nature and amount of the work to be sub-let

18. Will sub-contractors be required to give corporate bonds?

19. What is the estimated cost of work (by Architect or Engineer)?

20. What is your estimate of the cost of work to you?

21. With what bank have you arranged a loan for the purpose of handling this contract?

22. What is the amount of such loan? $

23. When and how must you repay the loan?

24. What security, if any, has the bank required for the loan?

25. Have you assigned or will you assign your payments on this contract or any part thereof?

Form D—67 24 Oct. 1933

26. What additional plant do you need? .....

27. Have you made binding commitments for materials required for this contract? .....
With whom? (Enumerate largest ones.) .....

28. Have you applied to any other Company for this bond? .....Give name of Company
and if declined, state why .....

29. Give names of surety companies you have previously dealt with .....

30. Who is to maintain fire and tornado insurance during construction? .....

31. Have you arranged Employers' Liability or Workmen's Compensation and Public Liability insurance required by the contract? .....What company? .....
(Give names of companies, amount of each policy and date of expiration)

32. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract? .....

33. Are there any mechanics' liens filed on any of your work anywhere? .....

34. Are there any judgments against you? .....Have you ever failed in business? .....

Contracts On Hand

Enumerate contracts you have under way, giving present status of each and name of surety.

Name of Work and Name of Owner	Original Price	Payments thus far received	Money thus far retained	Date Contract will be completed	Name of Surety

(Applicants and not Agents must fill out this Agreement)

AGREEMENT OF INDEMNITY

The undersigned hereby declares that the statements contained in the foregoing application are true, and are made without reservation for the purpose of inducing the STANDARD ACCIDENT INSURANCE COMPANY to become surety on the bond or bonds herein applied for; and in consideration of the STANDARD ACCIDENT INSURANCE COMPANY becoming surety on the bond or bonds herein applied for, hereby covenants and agrees as follows: To pay in advance the initial premiums or fees herein agreed to; namely:

$ ....., if a Proposal Bond.

$ [illegible].00 A.F.A., if a Performance Bond.

$ n/c Byt., if a Maintenance Bond, for the Term.

$ ....., if a Miscellaneous Bond, per annum for the Term.

Initial premium payments are subject to renewal, correction and adjustment to conform to the published Tower rates and are to be made until the undersigned shall deliver to said company, at its home office in Detroit, Michigan, competent written evidence of its discharge from such suretyship, and from all liabilities by reason thereof.

In further consideration of its becoming surety as above, the undersigned does hereby covenant and agree to perform all the conditions of said bond, and any and all renewals and extensions thereof, to be performed, and will at all times indemnify and save the surety harmless from and against all loss, costs, damages, expenses and attorneys' fees whatsoever (including fees of special counsel whenever by the surety deemed necessary), and any and all liability thereby, sustained or incurred by the company by reason of executing said bond or bonds or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained, and will place the surety in funds to meet every such claim, demand, liability, cost, charge, counsel fees, expense, suit, order, judgment or subdivision against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

And for the better protection of said Company, the undersigned, as of the date hereof, hereby assigns, transfers and [illegible] to the said STANDARD ACCIDENT INSURANCE COMPANY, all right [illegible] and interest of

20. Give names of surety companies you have previously dealt with .....

.....

21. Who is to maintain fire and tornado insurance during construction? .....

22. Have you arranged Employers' Liability or Workmen's Compensation and Public Liability insurance required by the contract? ..... What company? .....
(Give names of companies, amount of each policy and date of expiration)

23. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract? .....

24. Are there any mechanics' liens filed on any of your work anywhere? .....

25. Are there any judgments against you? ..... Have you ever failed in business? .....

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Enumerate contracts you have under way, giving present status of each and name of surety.

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(Applicants and not Agents must fill out this Agreement)

AGREEMENT OF INDEMNITY

The undersigned hereby declares that the statements contained in the foregoing application are true, and are made without reservation for the purpose of inducing the STANDARD ACCIDENT INSURANCE COMPANY to become surety on the bond or bonds herein applied for; and in consideration of the STANDARD ACCIDENT INSURANCE COMPANY becoming surety on the bond or bonds herein applied for, hereby covenants and agrees as follows: To pay in advance the initial premiums or fees herein agreed to; namely:

$ ..... , if a Proposal Bond.

$ 1,200.00 in f., if a Performance Bond.

$ n/c fyt., if a Maintenance Bond, for the Term.

$ ..... , if a Miscellaneous Bond, per annum for the Term.

Initial premium payments are subject to renewal, correction and adjustment to conform to the published Tower rates and are to be made until the undersigned shall deliver to said company, at its home office in Detroit, Michigan, competent written evidence of its discharge from such suretyship, and from all liabilities by reason thereof.

In further consideration of its becoming surety as above, the undersigned does hereby covenant and agree to perform all the conditions of said bond, and any and all renewals and extensions thereof, to be performed, and will at all times indemnify and save the surety harmless from and against all loss, costs, damages, expenses and attorneys' fees whatsoever (including fees of special counsel wherever by the surety deemed necessary), and any and all liability therefor, sustained or incurred by the company by reason of executing said bond or bonds or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained, and will place the surety in funds to meet every such claim, demand, liability, cost, charge, counsel fees, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

And for the better protection of said Company, the undersigned, as of the date hereof, hereby assigns, transfers and conveys to it, the said STANDARD ACCIDENT INSURANCE COMPANY, all right, title and interest of the undersigned is and to all the tools, plant, equipment and materials of every nature and description that may now or hereafter be upon said work, or in, on or about the site thereof, including as well all materials purchased for or chargeable to said contract which may now be in process of construction, or storage elsewhere, or in transportation to said site, hereby assigning and conveying also all rights of the undersigned in and to all sub-contracts, which have been or may hereafter be entered into, and the materials embraced therein, and authorizing and empowering said Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials and sub-contracts, and enforce, use and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect, as of the date hereof, should the undersigned fail, refuse or be unable to

complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on the part of the undersigned under the said contract.

In further consideration of the execution of the said bond, the undersigned does hereby agree, as of this date, that the said STANDARD ACCIDENT INSURANCE COMPANY, shall as surety on said bond, be subrogated to all rights, privileges and properties of the undersigned as principal and otherwise in said contract, and does hereby assign, transfer and convey to said Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable at the time of such breach or default, or that may thereafter become due and payable to said undersigned on account of said contract, or on account of extra work and materials supplied in connection therewith, hereby agreeing that all such moneys, and the proceeds of such payments and properties, shall be the sole property of the said STANDARD ACCIDENT INSURANCE COMPANY, and to be by it credited upon any loss, cost, damage, charge and expense sustained, or incurred by it as above under its bond of suretyship.

That in the event said Company executes said bond or bonds with Co-Sureties, or re-insures any portion of said bond or bonds with Re-insuring Companies, the undersigned agree that all of the terms and conditions of this agreement shall apply and operate for the benefit of such Co-Sureties and such Re-insuring Companies, as their interest may appear.

The undersigned further agrees that in the event of any modification, amendment or extension by the Company of the bond herein applied for, or its assent to any such modification, amendment or extension thereof shall not in anywise affect the liability of the undersigned hereunder.

And the undersigned further agrees that the execution by the undersigned of any other instrument whether relative to the bond hereby applied for or to any other former or subsequent bond, shall not release said undersigned from liability under the foregoing covenants, unless such other instrument shall expressly stipulate that the undersigned shall be released from such liability.

It is further agreed that in the event of any default, failure or refusal on the part of the undersigned to perform the contract guaranteed by the said bond, the Surety may at the expense of the undersigned, enter into any new agreement or agreements, with any person, firm or corporation for the performance of the work covered by said contract, or may complete the same, or the Surety may assent to a reletting or completion of the same by the owner, or by some other person firm or corporation for the owner, and in any such event, at the expense and the risk of the said undersigned to guarantee or procure a guarantee for such completion; that in any such event, all vouchers or agreements for expenses or liabilities incurred by the Surety in good faith, in adjusting, settling, paying or assuming the loss or liabilities thus incurred, or in procuring a guarantee for the same and the loss incident to such risk as may be thus incurred by the Surety, and including attorney's fees and traveling expenses shall be accepted as conclusive evidence against the undersigned and undersigned's estate, successors, or assigns of the fact and extent of undersigned's liability to the Surety under and by virtue of said contract, and the bond herein applied for, and said loss or liability when so paid, adjusted, incurred or assumed, or the amount paid in order to effect the completion of the work, or an agreement for the completion of the same, or by reason of any such guaranty, shall give to the Surety an immediate right of action against the undersigned or the undersigned's estate to the extent of the same, whether the same shall have been actually paid or not.

In the event that the Company executes more than one bond upon which the undersigned is principal, any collateral placed with the Company by the undersigned; or any sums paid to the Company which the Company is entitled to receive on any one or more of the bonds, may be applied in the discretion of the Company, to any loss or losses sustained on any of the other bonds; and any collateral so placed with the Company may be held by the Company until all risk or liability on any or all of the bonds shall have terminated.

In the event that the Company is required by the State Insurance Department to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the applicant, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned, jointly and severally, hereby covenants and agrees to immediately on demand, deposit with the Company, in current funds, an amount sufficient to cover such contingent claim or claims, as a trust fund or collateral security; to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may hereby incur, shall be included in such action and paid by the undersigned.

That the Company shall have the right at any and all reasonable times to ascertain from the bank or banks, or other depository, in which applicant deposits funds the amount standing to applicant's credit in such bank or banks, or other depository, also to have free access to books and records of applicant.

That the Surety shall, at its option, have and may exercise in the name of the undersigned, or otherwise, any right, or remedy, or demand which the undersigned may have, for the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands which the undersigned has or may have in the premises, all of which rights and remedies and demands are hereby assigned to the Surety, with full power and authority to said Surety, in the name of the undersigned or otherwise, as it may be advised, and as attorney for said undersigned to do anything, which the undersigned might do, if personally present, if this instrument were not executed, and said undersigned hereby appoints said Surety attorney of the undersigned for such purpose.

That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the undersigned, or of any person acting on behalf of the undersigned in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

It is hereby further agreed by the undersigned that the vouchers or other evidence of any loss paid by said STANDARD ACCIDENT INSURANCE COMPANY, under the aforesaid obligation, together with vouchers or other evidence of payment of all costs and expenses whatever incurred by said STANDARD ACCIDENT INSURANCE COMPANY, adjusting said loss or in completing said contract shall be taken as conclusive evidence not only against the undersigned jointly and severally, but as well against the respective heirs, executors, administrators successors and assigns, of the fact and extent of liability under said obligation of the said STANDARD ACCIDENT INSURANCE COMPANY.

It is further agreed that a default within the meaning of this obligation shall be any failure upon the part of the undersigned to comply with the directions of the engineer or architect in charge to perform the work at the time and in the manner specified in said contract and in the event the bond herein mentioned guarantees the payment of labor and materials in connection with the work, the failure of the undersigned to pay said bills when they become

...to the said Surety applied for or to any other former or subsequent bond, shall not release said undersigned from liability under the foregoing covenants, unless such other instrument shall expressly stipulate that the undersigned shall be released from such liability.

It is further agreed that in the event of any default, failure or refusal on the part of the undersigned to perform the contract guaranteed by the said bond, the Surety may at the expense of the undersigned, enter into any new agreement or agreements, with any person, firm or corporation for the performance of the work covered by said contract, or may complete the same, or the Surety may assent to a reletting or completion of the same by the owner, or by some other person firm or corporation for the owner, and in any such event, at the expense and the risk of the said undersigned to guarantee or procure a guarantee for such completion; that in any such event, all vouchers or agreements for expenses or liabilities incurred by the Surety in good faith, in adjusting, settling, paying or assuming the loss or liabilities thus incurred, or in procuring a guarantee for the same and the loss incident to such risk as may be thus incurred by the Surety, and including attorney's fees and traveling expenses shall be accepted as conclusive evidence against the undersigned and undersigned's estate, successors, or assigns of the fact and extent of undersigned's liability to the Surety under and by virtue of said contract, and the bond herein applied for, and said loss or liability when so paid, adjusted, incurred or assumed, or the amount paid in order to effect the completion of the work, or an agreement for the completion of the same, or by reason of any such guaranty, shall give to the Surety an immediate right of action against the undersigned or the undersigned's estate to the extent of the same, whether the same shall have been actually paid or not.

In the event that the Company executes more than one bond upon which the undersigned is principal, any collateral placed with the Company by the undersigned; or any sums paid to the Company which the Company is entitled to receive on any one or more of the bonds, may be applied in the discretion of the Company, to any loss or losses sustained on any of the other bonds; and any collateral so placed with the Company may be held by the Company until all risk or liability on any or all of the bonds shall have terminated.

In the event that the Company is required by the State Insurance Department to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the applicant, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned, jointly and severally, hereby covenants and agrees to immediately on demand, deposit with the Company, in current funds, an amount sufficient to cover such contingent claim or claims, as a trust fund or collateral security; to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may hereby incur, shall be included in such action and paid by the undersigned.

That the Company shall have the right at any and all reasonable times to ascertain from the bank or banks, or other depository, in which applicant deposits funds the amount standing to applicant's credit in such bank or banks, or other depository, also to have free access to books and records of applicant.

That the Surety shall, at its option, have and may exercise in the name of the undersigned, or otherwise, any right, or remedy, or demand which the undersigned may have, for the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands which the undersigned has or may have in the premises, all of which rights and remedies and demands are hereby assigned to the Surety, with full power and authority to said Surety, in the name of the undersigned or otherwise, as it may be advised, and as attorney for said undersigned to do anything, which the undersigned might do, if personally present, if this instrument were not executed, and said undersigned hereby appoints said Surety attorney of the undersigned for such purpose.

That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the undersigned, or of any person acting on behalf of the undersigned in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

It is hereby further agreed by the undersigned that the vouchers or other evidence of any loss paid by said STANDARD ACCIDENT INSURANCE COMPANY, under the aforesaid obligation, together with vouchers or other evidence of payment of all costs and expenses whatever incurred by said STANDARD ACCIDENT INSURANCE COMPANY, adjusting said loss or in completing said contract shall be taken as conclusive evidence not only against the undersigned jointly and severally, but as well against the respective heirs, executors, administrators successors and assigns, of the fact and extent of liability under said obligation of the said STANDARD ACCIDENT INSURANCE COMPANY.

It is further agreed that a default within the meaning of this obligation shall be any failure upon the part of the undersigned to comply with the directions of the engineer or architect in charge to perform the work at the time and in the manner specified in said contract and in the event the bond herein mentioned guarantees the payment of labor and materials in connection with the work, the failure of the undersigned to pay said bills when they become due and payable shall be a default within the meaning hereof.

If the applicant is awarded the contract the applicant shall not be obligated to secure his "contract" bond from the Company nor shall the Company be obligated to sign such bond.

And it is further agreed that in the event of the STANDARD ACCIDENT INSURANCE COMPANY, executing the Bond for which this application is made, the undersigned will pay a fee of $5.00 and such expenses in excess thereof as the said Company may be put to in investigating this application or in connection therewith, in case the bond should not be delivered to the obligee.

OVER

These covenants shall be binding not only upon the undersigned, jointly and severally, but as well upon the respective heirs, executors, administrators, successors and assigns of the undersigned, and shall be liberally construed as against the undersigned and each of them whether signing as principal on said bond or as indemnitor to the said STANDARD ACCIDENT INSURANCE COMPANY.

Dated at Boston, Mass. this 2nd day of October 19 40

IF INDIVIDUAL sign here:

Witness ..... Applicant (Seal)

IF CO-PARTNERSHIP sign here:

Witness ..... Applicant

INDIVIDUAL SIGNATURES

..... Member of Firm (Seal)

..... Member of Firm (Seal)

..... Member of Firm (Seal)

IF CORPORATION sign here:

Witness ..... GRAVES-DUNN CORPORATION Applicant

By [signature] (Name of Corporation) ✓ President

By ..... Secretary (Seal)

Seal: 1921

Individual or Firm Acknowledgment

STATE OF .....
COUNTY OF ..... } ss.

On this ..... day of ..... 19 . before me personally appeared the within named

to me known and known to me to be the individual(s) described in and who executed the foregoing instrument, and acknowledged to me that executed the same.

Notary Public

Corporation Acknowledgment

STATE OF New York
COUNTY OF New York } ss.

On this 2nd day of October 19 40, before me personally came

[signature], who being by me duly sworn did depose and say: that he resides in Cranford, N.J.; that he is the Vice President of the GRAVES-DUNN CORPORATION

the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[signature]
Notary Public

In consideration of the STANDARD ACCIDENT INSURANCE COMPANY executing the bond herein applied for, we jointly and severally join in the foregoing indemnity agreement.

Witness as to [signature] (Seal)

Witness as to [signature] (Seal)

Witness as to (Seal)

Note—If a co-partnership, firm name must be signed, also member individual seal above and signature of each member of firm. If corporation, corporate name must be signed in full with the officer's name and title as set below, duly attested and seal of the Company attested by the Secretary, and a corporate resolution giving that said officers are authorized to so sign shall accompany the application.

STATE OF New York
COUNTY OF New York } ss.

The foregoing indemnity agreement signed before me a Notary Public this 2nd day of October 19 40

[signature]
Notary Public

Nov 7th 1940 $50,000.00

Thirty after date, for value [illegible] promise to pay

to the order of Ourselves

Fifty Thousand 00/100 Dollars

payable at [illegible]

Each and every party to this instrument, either as maker, endorser, surety or [illegible] notice and protest, and assents to any extension or postponement of the time of payment or other indulgence [illegible] exchange or release of collateral granted or permitted by the holder.

Signature [illegible]

No. ——— Due

Address [illegible]

C 83

November 15, 1940 $30,000

On demand after date, for value received, we promise to pay to the order of Irving Trust

Thirty thousand & no/100 Dollars

payable at

Each and every party to this instrument, either as maker, endorser, surety or otherwise, [illegible] notice, to the said protest, and assents to any extension or postponement of the time of payment or other indulgence and to any [illegible] of collateral granted or permitted by the holder.

NOV 28 1940

Signature [illegible] Corp

No.______

C33 Due

Address [illegible]

77a

Nov 14th 1940 $30,000.00

On Demand We promise to pay

to the order of Irving Trust Co

Thirty Thousand & 00/100 Dollars

payable at Irving Trust Co New York N.Y.

Each and every party to this instrument, either as maker, endorser, surety [illegible] demand, notice and protest and assents to any extension or postponement of the time of payment or other indulgence [illegible] exchange or release of collateral granted or permitted by the holder.

Signature Graves-Dumm Corporation

No. Due

Address [illegible]

Graves-Dumm Corporation

By [illegible]

[illegible]

Vice Pres.

776

Nov 20th 1940 $40,000.00

On Demand for value received we promise to pay

to the order of Irving Trust Co

Forty Thousand 00/100 Dollars

payable at Irving Trust Co 100 East ... New York N.Y.

Each and every party to this instrument, either as maker, endorser, surety or otherwise, hereby waives demand, notice and protest, and assents to any extension or postponement of the time of payment or other indulgence and to any substitution, exchange or release of collateral granted or permitted by the holder.

Signature Graves Quinn Corporation

No.______ ________ Due

Address W. J. Quinn Pres. Lewis W. Graves Treas.

C81

Graves Quinn Corporation
Lewis W. Graves Treas.
W. J. Quinn Pres.
W. J. Quinn
Lewis W. Graves

IRVING TRUST COMPANY

New York

DATE 11/28/40

PAYMENT HAS BEEN MADE ON YOUR LOAN AS FOLLOWS:

DATE	AMOUNT OF LOAN	DUE	RATE	INTEREST	PRINCIPAL PAID	WE CREDIT YOUR ACCOUNT
11/16/40	30,000.					
11/15/40	30,000.	DEMand	4½		$100,000.00	
11/20/40	40,000.					

Graves Quinn Corp

- [x] WE ACKNOWLEDGE RECEIPT OF YOUR CHECK #
- [ ] WE HAVE REDUCED YOUR NOTE AND LOAN
- [x] CANCELLED NOTE IS ATTACHED
- [ ] CANCELLED NOTE WILL ACCOMPANY YOUR VOUCHERS

Loan of $150,000- paid by your check for same amount.

1710/39

77d

IRVING TRUST COMPANY

New York

We credit your account

DATE 11/25/40

DESCRIPTION	AMOUNT
Refund of discount on your loan of $50,000. due 12/[redacted]0 11 days less 1 day for uncollected funds: (Above note enclosed.)	$62.50

TO Graves Quinn Corp
1723 Grand Central Terminal
N.Y.City N.Y.

Lincoln Office.

WW

[fol. 76] EXHIBITS SUBMITTED BY PLAINTIFF ON ARGUMENT

These exhibits were submitted by plaintiff on argument.

(Opposite)

[fol. 78] IN SUPREME COURT OF NEW YORK

OPINION

By Mr. Justice Collins

McKenzie (Graves-Quinn Corporation) v. Irving Trust Co.—Defendant moves to dismiss the first cause of action on the ground that the defenses thereto are sufficient as matter of law and founded upon facts established by documentary evidence or official record.

The first cause of action is by the trustee in bankruptcy of Graves-Quinn Corporation, to recover the sum of $150,000 as an alleged preferential payment, it being asserted that the preference was made within four months prior to the filing of the petition in bankruptcy.

The salient facts are not enmeshed in controversy. The bankrupt had a contract with the Government, payments under which were assigned to the defendant on November 20, 1940; on November 27, 1940, the Government issued and delivered to the bankrupt its check for $155,865.50. Bankrupt mailed the check to the defendant, and it was deposited in the bankrupt's general account. Thereafter, on November 28, 1940, the bankrupt issued to the defendant its check for $150,000 in payment of four notes theretofore executed. It was not until December 2, 1940, that the assignment was filed with the Government, and on December 5, 1940, the assignment was approved by the Secretary of War.

The question thus posed is whether the filing with and acceptance by the Government of the assignment was so essential to its validity and effectiveness as to date the preference therefrom. The defendant maintains that the assignment became effective on November 22, 1940, when the [fol. 79] instrument of assignment was delivered to defendant, and that the subsequent filing of the assignment with, and acceptance of it by, the Government related back to the time of the assignment. "The core of the assignment," argues the defendant, "was the instrument of assignment." In any event, defendant maintains that without the consent, the assignment creates at least an equity (Pickering v. Lomax, 145 U. S. 310). An equitable assignment, contends the defendant, is enough to sustain the transfer, citing Central Trust Co. v. West India Imp. Co. (169 N. Y. 314);

Okin v. Isaac Goldman Co. (79 F. (2d) 317), and cognate cases.

Prior to October 9, 1940, assignments of claims against the Government were absolutely void. Section 15 of Public Contracts U. S. Code, Annotated, R. S. 3737, provided: "No transfer of contract—No contract or order, or any interest therein shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned."

Revised Statute 3477, being section 203, Title 31, Money & Finance, U. S. Code, Annotated, provides: "All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be absolutely null and void, unless they are freely made—after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

However, on October 9, 1940, to enable contractors having contracts with the Government more easily to finance their projects, Public Law No. 811 of the 76th Congress, [fol. 80] both of the foregoing sections were amended by adding at the end of each section the following paragraphs: "The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided, 1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned. 2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment. 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further as-

signment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing. 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—(a) The General Accounting Office, (b) The contracting officer or the head of his department or agency, (c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and (d) the disbursing officer, if any, designated in such [fol. 81] contract to make payment. Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes. Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract. Sec. 2. This Act may be cited as the 'Assignment of Claims Act of 1940.' Approved, October 9, 1940."

The contract in suit was executed September 14, 1940, prior to the enactment of the amendment. The bankrupt did not comply with the above provisions until after payment. Yet until compliance therewith the assignment was null and void (National Bank of Commerce v. Downie, 218 U. S. 345). Nor was the assignment effective within the meaning of section 60a of the Bankruptcy Act as amended in 1938 until at least December 5, 1940.

No notice of this assignment was given to anybody prior to December 2. The defendant bank avows that "it was decided to refrain from filing the assignment immediately as it was feared such action might further delay issuance of the check."

I think the payment to the defendant without first filing and acceptance of the assignment within four months of bankruptcy constituted a preference (Collier on Bankruptcy, 14 ed., pp. 867-868, 892, 894, 896, 897).

At page 894 of Collier's, it is said: "The last sentence of [fol. 82] 60a, of the Act of 1938, properly construed, overrules much prior case law, particularly in reference to the

effect of lack of recording, and the doctrine of relation back as applied to possession taken under 'equitable liens and assignments.' "

And at page 897: "* * * To repeat a statement made in the preceding paragraph and strongly emphasized by Professor McLaughlin of Harvard this test is drawn so as to direct judicial investigation of the preferential character of a transfer to a time when such transfer has become, legally speaking, notorious or publicly known, and has lost many aspects of secrecy such as lack of recording or change of possession. As stated succinctly by Mr. Jacob Weinstein, one of the draftsmen of the 1938 Act, it relates to a point of time 'when the debtor has done everything required of him under applicable State Law in order to make the transfer so complete that it would be good against the whole world.' "

Here, not only did the statute require filing and consent, but, in addition, required notification of the assignment to be sent to the surety company.

In Re Quaker City Sheet Metal Company (129 Fed. (2d) 894) it was held that because no notice of the assignment was given the transfer must be deemed to have been made immediately before bankruptcy.

From what has been said it follows that the defendant's motion to dismiss the first cause of action must be and it is denied. Order signed.

[fols. 83-84] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal to the Appellate Division, the order appealed from, the opinion of the Court, and all the papers upon which the Court below acted in making the said order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, January 12, 1943.

Paul E. Mead, Attorney for Defendant-Appellant.
M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff-Respondent.

[fol. 85] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please Take Notice that the plaintiff above named hereby appeals to the Court of Appeals of the State of New York from a judgment herein dated July 15th, 1943, and entered in the office of the Clerk of the County of New York on July 15th, 1943, which judgment dismissed the first cause of action contained in the complaint and was entered upon an order of the Appellate Division of the Supreme Court, First Department, dated July 2nd, 1943, reversing an order of summary judgment dismissing the said first cause of action, and which said order of the Appellate Division granted the said motion, and said judgment having been entered upon an order in the Supreme Court, New York County, severing the first cause of action from the balance of the action so that a separate and distinct judgment could be entered thereon.

Please Take Further Notice that this appeal is from each [fol. 86] and every part of the said judgment, and said order of the Appellate Division, First Department, as well as from the whole thereof.

Dated, New York, July 16th, 1943.

Yours, etc., M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York City.

To: Paul E. Mead, Esq., Attorney for Defendant, 1 Wall Street, New York City; Clerk of the County of New York; Clerk of the Court of Appeals of the State of New York.

[fol. 87] In Supreme Court of New York, County of New York

[Title omitted]

Order of Severance—July 10, 1943

On reading and filing the annexed stipulation dated July 9th, 1943,

Now, on motion of M. Carl Levine, Morgulas & Foreman, attorneys for the plaintiff herein, it is

Ordered, that the above entitled action be severed so that each of the two causes of action therein referred to may proceed as separate actions, and so that each of said causes of action may terminate in distinct, separate and appropriate judgments; and it is further

Ordered, that this order of severance shall be without prejudice to the rights of either of the parties herein in any [fol. 88] pending or future appeal from an order of the Appellate Division, Supreme Court, First Department, dated July 2nd, 1943, granting defendant's motion for summary judgment herein dismissing the first cause of action.

Enter, K. O'B., J. S. C.

In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, Presiding Justice; Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Albert Cohn, Hon. Joseph M. Callahan, Justices.

13003

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Respondent,

vs.

Irving Trust Company, Appellant

Order of Reversal—July 2, 1943

An appeal having been taken to this Court by the defendant from an order of the Supreme Court, New York County, [fol. 89] entered on the 5th day of December, 1942, denying defendant's motion to dismiss the first cause of action set forth in the complaint, and said appeal having been argued

by Mr. William Onderdonk, of counsel for the appellant, and by Mr. David Morgulas, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed upon questions of law with $20 costs and disbursements to the appellant and the motion granted.

Enter, F. M.

In Supreme Court of New York, New York County

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Plaintiff,

against

Irving Trust Company, Defendant

Judgment of Reversal

The defendant above-named having made a motion to dismiss the first cause of action set forth in the complaint, and said motion coming on to be heard at Special Term, Part [fol. 90] III, of this court, on the 30th day of October, 1942, and the court having made an order denying the motion of defendant, and said order having been duly entered in this office on the 5th day of December, 1942, and defendant having appealed from said order, and the Appellate Division, First Department, having by order dated July 2, 1943, reversed said order and granted the motion to dismiss the first cause of action upon the merits, and this court by an order herein dated July 10, 1943, having severed the action so that each of the two causes of action set forth in the complaint shall proceed as separate actions and terminate in distinct separate and appropriate judgments,

Now, on motion of Paul E. Mead, attorney for defendant, it is

Adjudged that the first cause of action of the complaint be, and the same hereby is dismissed upon the merits, and that defendant Irving Trust Company do recover of plaintiff Albert E. McKenzie, as Trustee in bankruptcy of Graves-Quinn Corporation, the sum of $371.44 costs as taxed, and that defendant have execution therefor.

Dated, July 15, 1943.

Archibald R. Watson, Clerk.

Entered July 15, 1943. 10 H. 40 M.

[fol. 91] In Supreme Court of New York, Appellate Division—First Department, April, 1943

Francis Martin, P. J., Alfred H. Townley, Edward J. Glennon, Albert Cohn, Joseph M. Callahan, JJ.

13003

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Respondent,

vs.

Irving Trust Company, Appellant

Appeal from an Order of the Supreme Court, New York County, Denying Defendant's Motion to Dismiss the First Cause of Action Set Forth in the Complaint

William A. Onderdonk, of counsel (Paul E. Mead, attorney), for appellant.

David Morgulas, of counsel (M. Carl Levine, Morgulas & Foreman, attorneys), for respondent.

Opinion

Cohn, J.:

Defendant Irving Trust Company appeals from an order denying its motion for summary judgment dismissing the [fol. 92] first cause of action set forth in the complaint.

In the cause of action challenged plaintiff, the trustee in bankruptcy of Graves-Quinn Corporation, seeks to recover a payment of $150,000 which was made by the bankrupt Graves-Quinn to defendant on November 28, 1940, exactly four months before the filing of a petition in bankruptcy, asserting that the payment was preferential by virtue of the provisions of Section 60-a of the Bankruptcy Act (11 U. S. C. A., sec. 96). Prior thereto and on November 22, 1940, defendant received from the Graves-Quinn Corporation a *bona fide* assignment of all moneys due or to become due from the United States Government by reason of the Government's contract with the Graves-Quinn Corporation.

The principal question involves the interpretation of Section 60-a of the Bankruptcy Act insofar as that statute affects an assignment of moneys to become due from the

United States on a construction contract and whether the four month period referred to in Section 60-a begins to run from the date of the delivery of the assignment or from the date of the filing of the assignment as required by an act of Congress dated October 9, 1940, amending the federal statutes dealing with the assignment of moneys due from the Federal Government. (Title 31, U. S. C. A., sec. 203.)

It is our view that the assignment was not inoperative because of the delay either in obtaining the consent of the Secretary of War thereto or in the filing of the assignment with the various government departments. (Amiesite Constr. Corp. v. Luciano Conr. Co., 284 N. Y. 223; Salem [fol. 93] Co. v. Manufacturers' Co., 264 U. S. 182.) The primary purpose of the Assignment of Claims Act (Title 31 U. S. C. A., § 203) is to give protection to the Government. (Martin v. National Surety Co., 300 U. S. 588.) The only infirmity in the assignment pending the consent and filing was the impairment of recourse of defendant to the government. Otherwise, the assignment was fully perfected. No other creditor of Graves-Quinn Corporation could have acquired any rights in the property so transfer-ed superior to the rights of the defendant by taking an assignment from the bankrupt after November 22, 1940, and by obtaining the War Department's consent to the assignment. (Salem Co. v. Manufacturers' Co., supra; Williams v. Ingersoll, 89 N. Y. 508; Superior Brassiere Co., Inc. v. Zimetbaum, 214 App. Div. 525.)

In Corn Exchange National Bank and Trust Co. v. Klander, 318 U. S. 434 (decided March 8, 1943), the court was considering assignments made in Pennsylvania where the law provided that, of two assignees of choses in action, the one first giving notice to the obligor had priority and it was held that, because of the failure of the assignees to give notice, a subsequent good faith assignee giving such notice would acquire a right superior to theirs. In holding the assignments inoperative against the trustee in bankruptcy, the court said:

> "This is undoubtedly the effect of a literal reading of the Act. Its apparent command is to test the effectiveness of a transfer, as against the trustee, *by the standards which applicable state law would enforce against a food-faith purchaser.* Only when such a pur- [fol. 94] chaser is precluded from obtaining superior

rights is the trustee so precluded. So long as the transaction is left open to possible intervening rights to such a purchaser, it is vulnerable to the intervening bankruptcy. By thus postponing the effective time of the transfer, the debt, which is effective when actually made, will be made antecedent to the delayed effective date of the transfer and therefore will be made a preferential transfer in law although in fact made concurrently with the advance of money. In this case the transfers, good between the parties, had never been perfected as against good-faith purchasers by notice to the debtors as the law required, and so the conclusion follows from this reading of the Act that the petitioners lose their security under the preference prohibition of section 60 (b)." (Emphasis ours.)

On the facts in this case, under the laws of this State, no purchaser in good faith could acquire on November 28, 1940, any right superior to the defendant. Hence, the payment of $150,000 made by the bankrupt to defendant on November 28th was not a preferential one. Plaintiff is accordingly entitled to judgment dismissing the first cause of action upon the merits.

The order should be reversed with $20 costs and disbursements and the motion to dismiss the first cause of action granted.

All Concur

[fol. 95] Stipulation Waiving Certification to Court of Appeals

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the record on appeal to the Appellate Division of the Supreme Court for the First Department, the notice of appeal to the Court of Appeals, order of severance, the order of reversal, the judgment of reversal, and the opinion of the Appellate Division for the First Department, all of which papers are now on file in the office of the Clerk of the County of New York; and certification of all of the foregoing papers is hereby waived.

Dated, New York, December , 1943.

M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff-Appellant; Paul E. Mead, Attorney for Defendant-Respondent.

[fol. 96] COURT OF APPEALS, THURSDAY, APRIL 13, 1944

ALBERT E. McKENZIE, as Trustee in Bankruptcy of Graves-Quinn Corporation, Appellant,

v.

IRVING TRUST COMPANY, Respondent

Decided April 13, 1944

Appeal from a judgment, entered July 15, 1943, upon an order of the Appellate Division of the Supreme Court in the first judicial department which (1) reversed on questions of law an order of a Special Term of the Supreme Court, New York County (Collins, J.) denying a motion by defendant for a dismissal of the first cause of action set forth in the complaint and (2) granted the motion. Following the making of said order of reversal by the Appellate Division, an order was made by Special Term (O'Brien, J.), on written stipulation, directing, among other things, a severance of the action so that each of the two causes of action might proceed as a separate action and terminate in a separate judgment.

David Morgulas for appellant.
William A. Onderdonk and *Paul E. Mead* for respondent.

LEHMAN, Ch. J.:

On March 28, 1941, a petition in bankruptcy was filed against Graves-Quinn Corporation and thereafter the corporation was duly adjudicated a bankrupt. On November 28, 1940, the defendant bank had received from the bankrupt its check for $150,000. The check had been mailed from Boston on November 27th. The deposit account of the bankrupt with the defendant bank was at that time overdrawn. It had borrowed large sums of money from the bank and had executed and delivered to the bank three promissory notes aggregating the sum of $150,000. On November 27, 1940, the bankrupt received a check for $155,865.50 from the United States Government in payment of construction work which the bankrupt was performing under a contract with the War Department. On the same evening the bankrupt mailed that check to the bank for deposit in the bankrupt's account, and also mailed to the bank

a second check in the sum of $150,000 drawn on its deposit account to the order of the bank. The bank received the checks on November 28th and used the bankrupt's check for $150,000 to pay and discharge three promissory notes of the bankrupt executed by the bankrupt when it borrowed that amount from the bank. After the adjudication in bankruptcy the trustee brought an action for the restitution of the moneys of the bankrupt which the bank had applied on November 28, 1940, to the payment of that indebtedness.

The first cause of action in the complaint alleges that such transfer of its moneys by the bankrupt in payment of an antecedent indebtedness operated as a preference which is unlawful under the provisions of the Bankruptcy Act (U. S. Code, tit. 11). The second cause of action alleges that the transfer was void because in violation of section 15 of the Stock Corporation Law of the State of New York. In its answer the defendant, in addition to denials of material allegations of the complaint, pleaded certain affirmative defenses to each cause of action and then moved pursuant to rule 113 of the Rules of Civil Practice for summary judgment dismissing the first cause of action on the ground that "the defenses thereto are sufficient as matter of law and founded upon facts established by documentary evidence or official record". The Appellate Division unanimously reversed an order of Special Term denying the motion and granted the motion to dismiss the first cause of action alleged in the complaint. An order of severance and a judgment dismissing the first cause of action was entered. Upon this appeal we are concerned only with that cause of action.

The alleged unlawful transfer on November 28th was made, it is said, exactly four months prior to the date of the petition in bankruptcy. Payment of an antecedent debt by a transfer of moneys, at that time belonging to the bankrupt, upon which the creditor had no lien and in which it had no special property would, it is plain, constitute an unlawful preference which could be set aside upon the suit of the trustee. That would not be true, however, if the payment of the antecedent debt was made from property of the debtor which had been transferred to the creditor at any time prior to November 28th, and the defendant has pleaded in its affirmative defenses and, upon the motion for summary judgment has established, facts which, it is contended, show a prior assignment by the debtor of the moneys which might thereafter be paid by the government for work performed

under the construction contract of the defendant and which show, also, that on and after November 27th, if not before, the "defendant had a lien and right of offset against the deposit balance of Graves-Quinn Corporation to the amount of $150,000." The Bankruptcy Act which in section 60 provides that a preferential transfer of property by an insolvent debtor in payment of an intecedent debt shall be void if made within four months of the filing of a petition in bankruptcy, by an amendment adopted in 1938 also formulates in section 60 (subd. a) the test which must be applied in determining the date when a transfer is complete. "A transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy * * * it shall be deemed to have been made immediately before bankruptcy." We apply that test here. The problem presented upon this appeal is whether a transfer so perfected that it can withstand that test was made on or before November 27th.

[fol. 97] The facts which may be relevant to that problem are not disputed. In September, 1940, Graves-Quinn Corporation, the bankrupt, entered into a contract with the War Department for the construction of military housing at several places in New England, for a stipulated consideration of approximately $1,000,000. In accordance with the terms of the contract, Standard Accident Insurance Company executed and delivered bonds for the performance of its contract by the bankrupt and for the payment by the bankrupt for labor and materials furnished to it. The bankrupt, in October and November, 1940, became indebted to the defendant for moneys which it borrowed from the defendant and for overdrafts made by the bankrupt upon its bank account. In accordance with an understanding or agreement it had with the defendant, the bankrupt from time to time applied upon this indebtedness moneys which were paid to the bankrupt by the government. On November 22, 1940, the bankrupt upon the demand of the defendant, delivered to it an assignment of "any and all sums of money now due or to become due" under its contract with the War Department.

In September, 1940, when the contract was made, assignments of moneys due or to become due from the United

States under contracts with the government, were expressly prohibited by statute: "All transfers and assignments made of any claim upon the United States. * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be absolutely null and void, unless they are freely made * * * after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *" United States Code, title 31, Money and Finance, section 203 (Revised Statutes, 3477). The assignment delivered by the bankrupt on November 22, 1940, would undoubtedly have been "absolutely null and void" if the statute had not been amended on October 9, 1940, for the express purpose of authorizing subject to conditions therein specified, the assignment of claims against the United States arising even under contracts theretofore made with the government (Public Law No. 811 of the 76th Congress). The statute as amended provides that:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending Agency: Provided,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. * * * * * * *

"3. * * * * * * *

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—

"(a) the General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment.

"Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

The defendant bank did not request or receive the "consent of the head of the department or agency concerned" to the assignment executed on November 22nd until after November 28th, when it had obtained from the bankrupt and applied to the payment of the antecedent debts of the bankrupt, the proceeds of the check which the bankrupt had received from the United States; nor did it file written notice of the assignment until after that time as required in subdivision 4 of the amended statutes. It enclosed the assignment in a letter addressed to the Quartermaster General in Washington dated November 27, 1940, in which for the first time it "requested the approval of the Head of the Department concerned" and stated that it "should appreciate your cooperation in obtaining this approval." Accordingly on December 4th the assignment was transmitted by the office of the Quartermaster General to the Assistant Secretary of War with a memorandum stating among other things: "2. It is the opinion of this office that the attached assignment has been executed pursuant to and in accordance with the Assignment of Claims Act of 1940 and, therefore, constitutes a valid assignment. 3. It is recommended that the attached assignment be approved by you in accordance with the provisions of subdivision 1 of the Assignment of Claims Act of 1940." The following day, December 5, 1940, the Secretary of War formally approved the assignment. In the meanwhile on December 2, 1940, the defendant had sent written notices of the assignment to the surety company and the other persons with whom such written notices must be filed in accordance with subdivision 4 of the amended statute. Thus it appears undisputed that on December 5th there was full compliance with every condition provided by the statute in connection with the assignment of claims against the United States; but since such compliance was completed within four months of the filing of the petition of bankruptcy the question arises whether the assign-

ment constitutes a transfer which was "perfected" within the meaning of the Bankruptcy Act when executed or only when there was compliance with all the conditions provided in the Assignment of Claims Act.

The right to assign a debt or claim arising under a contract with the United States may be granted or withheld by Congress and the power of Congress to attach such conditions as it sees fit to the grant of a right to assign is not open to serious challenge. Here it has granted a right to assign; there has been compliance with the statutory conditions and the United States does not challenge the validity of the assignment. We are told that Congress attached conditions to the right to assign a claim against the United States primarily for the protection of the government and that it "was not inoperative because of the delay either in obtaining the consent of the Secretary of War thereto or in the filing of the assignment with the various government departments" (266 App. Div. 599, 601) citing *Amicsite Constr. Corp.* v. *Luciano Contr. Co.* (284 N. Y. 223); *Salem Co.* v. *Manufacturers' Co.* (264 U. S. 182).

Congress, by its amendment to the Assignment of Claims Act, sanctioned the assignment of claims against the United States subject to the specified conditions for the purpose of enabling contractors to borrow money for the performance of the work upon the assurance that moneys received in payment for the work would be used to satisfy the debt. That appears plain upon the face of the statute and is confirmed by the debate in Congress. It is not so plain that the conditions that the consent of the head of the department be obtained and that the assignment be filed in government offices were attached to the right to assign solely for the protection of the government. The debates in Congress suggest additional reasons. The Chairman of the Judiciary Committee of the House of Representatives explained: "If this bill is not enacted there can be no assignment of claims. That is the first proposition. The agencies of the Government which have responsibility are themselves responsible for proposing this legislation. They came down to the Committee on the Judiciary, * * * and indicated their desire to increase as far as possible the number of persons who could bid on these contracts, and who could help the Government in this emergency. They said, however, with reference particularly to some of the equipment material, with regard to which secrecy had to

be preserved, that they did not want to take the responsibility of advising that in every case these claims should be assignable, or that there would not be in the nature of things some claims that should not be assigned." (Congressional Record, vol. 86, Part ii, p. 12557.)

We think that consent was required by Congress, not only for the protection of the government but also for the protection of the public from harm which might arise from assignment of some contracts with the War Department, the Navy Department or other departments of the government. To afford such protection in the fullest measure, we think that Congress may well have intended that an assignment of a claim for moneys due or to become due under a contract with the United States should be absolutely void *unless* consent was given, and should be "inoperative" *until* such consent was given. The question is now posed whether compliance with the statutory conditions, required to give force to the inchoate assignment of a claim, has retroactive effect for any purpose, or whether even after the assignment has become fully valid and enforcible it may be given effect only as if executed at the time when all statutory conditions were fulfilled. That is a question which depends solely upon the construction of a statute of Congress, and we are told that the question has not yet been considered or decided by any Federal court.

Congress, in attaching conditions to the contractors' right to assign claims against the United States, had, it is plain, no intention to dictate to the contractor what he should do with the moneys received upon his contract. *Hobbs* v. *McLean*, 117 U. S. 567.) After the contractor has fully complied with the conditions attached to his right to assign, the purpose of imposing any limitation upon the contractor's freedom to assign claims is fulfilled, and the government and the public have received the intended protection and have no interest in any controversy between successive assignees of the fund or claim or between persons asserting conflicting liens at law or in equity in the fund. It has been held that even where the statute provides that a transfer or assignment of a claim against the United States "shall be absolutely null and void" unless executed with prescribed formalities after "the issuing of a warrant for the payment thereof", an assignment which is for that reason "void" may still give rise to equities, and after the moneys are "in the hands of the contractor or subsequent

payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed." (*Martin* v. *National Surety Co.*, 300 U. S. 588, 596.) Though the analogies may not be complete, what was said and decided in that case may guide us in seeking the intent of the statute enacted after that case was decided.

Here the statute does not in express terms declare that an assignment is wholly void until the assignment has been filed and consent has been given. On the contrary, under the statute the assignment is permitted, *provided* that there is compliance with these conditions. Not only have the government and the public no interest in refusing all retroactive effect to such compliance, but the purpose of the government in sanctioning assignments to financial institutions, subject to specified conditions, might be thwarted in part if a lender who receives an executed assignment as security for a loan did not have the assurance that it thereby acquired an inchoate interest in the fund which would become enforcible when he complied with the statutory conditions. A consent which gives validity to an assignment previously executed, like the ratification of a contract made without prior authorization, cannot wipe out property rights acquired by third parties in the interval between the execution of the assignment and the consent without which it lacks validity. We think that at least as between the parties to the assignment, the assignment, however, effects an inchoate transfer of the assigned rights or property even though there must thereafter be compliance with statutory conditions before the assignment becomes enforcible.

That brings us to the question whether prior to November 28, 1940, the assignment of the moneys due or to become due under the contract was "perfected" within the meaning of section 60, subdivision (a) of the Bankruptcy Act [U. S. Code, tit. 11, § 96, subd. (a)], even though consent was not given until later. The test under the statute as amended in 1938 is, as I have said, whether no "*bona fide* purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein". The "standards which applicable state law would enforce against a good-faith purchaser" or against a creditor must be applied here. (*Corn Exchange Bank* v. *Klauder*, 318 U. S. 434.)

The test of what constitutes a perfected transfer formulated in section 60, subdivision a, is not the test previously applied. It is "more comprehensive and accords with the contemplated purpose of striking down secret liens. * * *" (House Reports, No. 1409, 75th Congress, First Session, p. 30. See *Corn Exchange Bank* v. *Klauder*, *supra*.) The appellant, however, fails to point out any rule of law whereby a *bona fide* purchaser for value or a creditor could have any rights in the moneys which might become due under the contract before they were paid to the contractor or its assignee, except perhaps a lienor under the provisions of the Lien Law of this State. It is unnecessary to decide whether the word "creditor" in the Bankruptcy Act was intended to include a lienor who complied with the statute, or whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the defendant on November 27th. It seems clear that at least from that time the transfer was perfected.

Certainly when the contractor received payment by check from the government on November 27th it was in good faith bound to deliver the check or its proceeds to the defendant in accordance with its agreement as evidenced by the executed assignment. The contractor had received a direction from the bank that the check should be mailed to it, and from the time that the check was deposited in the mail in accordance with that request, delivery of the moneys to the assignee was complete. The book entries of the bank on November 28th by which the check received by the contractor from the government was deposited in the account of the contract and the check of the contractor to the order of the bank in payment of indebtedness to the bank, merely constituted a record of the transaction in compliance with the directions of the contractor.

The appellant maintains, finally, that if an assignment of claims against the United States may be given effect without compliance with the statutory conditions, the surety company had received a prior assignment of the same moneys and therefore had rights superior to the rights of the defendant as subsequent assignee. Many objections are pointed out by the respondent to that contention of the plaintiff-appellant. We do not consider these objections, for the action is not brought by the plaintiff as trustee to establish that the surety company has a title superior to the title

of the bank. The action is brought solely to set aside the transfer to the bank as an unlawful preference. The trustee in bankruptcy has no authority to bring an action to establish a superior title in some other person.

The judgment should be affirmed, with costs.

Loughran, Rippey, Lewis, Conway, Desmond and Thacher, JJ., concur.

Judgment affirmed.

[fol. 99] Court of Appeals,
State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 13th day of April, in the year of our Lord one thousand nine hundred and forty-four, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding, John Ludden, Clerk.

Remittitur, April 14, 1944.

[fol. 99a] Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Appellant,

ag'st

Irving Trust Company, Respondent

Be it Remembered, That on the 19th day of February in the year of our Lord one thousand nine hundred and forty-four, Albert E. McKenzie, as trustee in bankruptcy, &c., the appellant in this cause, came here unto the Court of Appeals, by M. Carl Levine, Morgulas & Foreman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Irving Trust Company, the respondent in said cause, afterwards appeared in said Court of Appeals by Paul E. Mead, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 100] Whereupon, The said Court of Appeals having heard this cause argued by Mr. David Morgulas, of counsel for the appellant, and by Mr. William A. Onderdonk of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the

Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 100a] Therefore, it is considered that the said judgment be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 14, 1944:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 101] At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the County Courthouse, Borough of Manhattan, City of New York, on the 18 day of April, 1944.

Present: Hon. Aaron J. Levy, Justice.

Index #7149/1942

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Plaintiff,

against

Irving Trust Company, Defendant

The above mentioned plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered on the 15th

day of July, 1943, in the office of the Clerk of New York County, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed, and judgment entered for the defendant with costs, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County,

Now, on motion of Paul E. Mead, attorney for defendant, it is

Ordered that the said judgment of the Court of Appeals be and the same hereby is made the judgment of this Court.

Enter,

A. J. L., J. S. C.

Filed, Apr. 19, 1944. New York County Clerk's Office.

[fol. 102] Sir:

Please to take notice that the within is a copy of an order this day duly made and entered herein in the office of the Clerk of New York County.

Dated, N. Y., April 17, 1944.

Yours, &c., Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City.

To M. Carl Levine M. & F. Esq., Attorneys for Plaintiff.

[Endorsed:] File No. 7149. Year 1942. Supreme Court: New York County. Albert E. McKenzie, as Trustee, etc., Plaintiff, against Irving Trust Company, Defendant. Order for Judgment. Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City. To M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

[Stamp:] Copy Received Apr. 20, 1944. M. Carl Levine, Morgulas & Foreman, Attorneys for ——.

[fol. 103] SUPREME COURT, NEW YORK COUNTY

Index #7149/1942

ALBERT E. McKENZIE, as Trustee in Bankruptcy of Graves-Quinn Corporation, 521 Fifth Avenue, New York City, Plaintiff,

against

IRVING TRUST COMPANY, 1 Wall Street, New York City, Defendant

The above named plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered in this action on the 15th day of July, 1943, and from an order of the Appellate Division entered on the 2nd day of July, 1943, reversing the order herein entered on the 4th day of December, 1942, in the office of the Clerk of New York County, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed and judgment rendered for defendant with costs, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court,

Now, on motion of Paul E. Mead, attorney for defendant, it is

Adjudged that the judgment in this action, entered on the 15th day of July, 1943, be and the same hereby is affirmed, and that defendant Irving Trust Company recover of plaintiff Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation the sum of $206.44, the amount of its costs herein as taxed, and that defendant have execution therefor.

Dated: April 19th, 1944.

Archibald R. Watson, Clerk. (Seal.)

[fol. 104] Sir:

Please to take notice that the within is a copy of a Judgment this day duly made and entered herein in the office of the Clerk of New York County.

Dated, N. Y., April 19, 1944.

Yours, &c., Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City.

To M. Carl Levine, M. & F., Esq., Attorneys for plaintiff.

[Endorsed:] File No. 7149. Year 1942. Supreme Court, New York County. Albert E. McKenzie, as Trustee, etc., Plaintiff, against Irving Trust Company, Defendant. Judgment. Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City. To M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

[Stamp:] Copy Received Apr. 20, 1944. M. Carl Levine, Morgulas & Foreman, Attorneys for ——.

[fol. 105] Clerk's Certificate

State of New York,
County of New York, ss:

I, Archibald R. Watson, Clerk of the Supreme Court in and for the said County and Clerk of the Supreme Court of said State, Do Hereby Certify that the foregoing consists of a copy of the Record on Appeal to the Court of Appeals, State of New York, the Remittitur dated April 14, 1944, of the Court of Appeals, State of New York, the Order on Remittitur dated April 18, 1944, and the Judgment on Remittitur dated April 19, 1944, all on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 14th day of June, A. D., 1944.

Archibald R. Watson, Clerk. (Seal.)

[fol. 110] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter M. Carl Levine File No. 48,641 New York, Court of Appeals, Term No. 188. Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Petitioner, vs. Irving Trust Company. Petition for a writ of certiorari and exhibit thereto. Filed June 23, 1944. Term No. 188 O. T. 1944.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 23 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 188

ALBERT E. McKENZIE AS TRUSTEE IN BANKRUPTCY OF GRAVES-QUINN CORP,

Petitioner,

vs.

IRVING TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

M. CARL LEVINE,
DAVID MORGULAS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 188

ALBERT E. McKENZIE AS TRUSTEE IN BANKRUPTCY OF GRAVES-QUINN CORP,

Petitioner,

against

IRVING TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert E. McKenzie as Trustee in Bankruptcy of the Graves-Quinn Corp. respectfully submits this petition for a writ of certiorari to review the decision of the Court of Appeals of the State of New York, 292 N. Y. 347 which affirms the final judgment of the Apellate Division of the Supreme Court of the State of New York, First Department and the final judgment entered thereon in the Supreme Court of the State of New York in the office of the Clerk of the County of New York under date of April 19th, 1944.

History of the Case.

This action was originally brought by the Petitioner predicated on two causes of action (R. 35). The first cause of action sought to set aside a transfer of $150,000 made by the bankrupt to the respondent as being preferential within the meaning of Section 60-a of the Bankruptcy Act. The second cause of action sought to nullify the transfer on the ground that it was void within the meaning of Section 15 of the Stock Corporation Law of the State of New York. Subsequently and prior to the judgment of the Court of Appeals of the State of New York, the second cause of action was severed by order of the Supreme Court of the State of New York, so that the instant action might proceed as if only the first cause of action were present and the judgment final (R. 87). We will accordingly proceed to a discussion of the history of the proceedings herein on the assumption that the action concerns itself *ab initio* only with the first cause of action.

After issue had been joined, respondent moved for summary judgment in accordance with Section 113 of the Rules of Civil Practice of the State of New York (R. 4) on the ground that as a matter of law the alleged transfer had occurred more than four months prior to the filing of the bankruptcy petition.

The respondent's motion for judgment was originally heard at a Special Term of the Supreme Court of the State of New York, and the motion denied, on the ground that the alleged preference did occur within the four-month period. The opinion is not officially reported and is found at R. 78 to 82.

The respondent then appealed to the Appellate Division of the Supreme Court of the State of New York (R. 2) wherein the order of the Special Term was reversed (R. 88) and judgment rendered for the respondent dismissing

the complaint (R. 89). The opinion of the Appellate Division is found at R. 91 to 94 and is published in the Official New York State Reports at 266 A. D. 599.

Your petitioner thereupon appealed to the Court of Appeals of the State of New York (R. 85) and the judgment of the Appellate Division was unanimously affirmed. The opinion of the Court of Appeals is appended to the Record. It has been published in the Official Reports of the State of New York, 292 N. Y. 347.

The Court of Appeals is the highest Court of the State of New York to which any appeal could be taken and the judgment of affirmance will remain final, unless jurisdiction is taken by this Court.

Summary Statement of Matter Involved.

In September of 1940, the Bankrupt entered into a contract with the United States for the construction of military housing facilities at a price of $1,008,800. The Standard Accident & Insurance Company delivered its performance and payment bond to the Government and simultaneously therewith and under date of October 2nd received an assignment from the Bankrupt of all funds to become due from the Government (R. 74). On October 24th, 1940 the contractor borrowed $40,000 for a 10-day period, the Bank expecting repayment within a week (R. 49). On November 15th, 1940 the contractor was indebted to the respondent for about $85,000 (R. 50). At this point it clearly appeared that the contractor was in financial difficulty and the respondent feared that if work stopped, the surety company might step in and complete the construction and at the same time obtain all payments from the Government. In order, therefore, to lend an appearance of normalcy, the respondent continued to lend the contractor more money with the intent of seizing the next

payment to become due from the Government before the surety's attention could be drawn to the contractor's financial difficulties. The respondent's officers then started a series of discussions as to how they might best extricate themselves from their precarious situation (R. 51).

Toward the end of November, 1940 the Government was considering a substantial progress payment to the Contractor. At that time many of the subcontractors were unpaid (R. 73-74). The respondent's officers knew full well that the surety company might at that moment step in and take over the job under its right of subrogation and receive all Government payments (R. 51). The Bank had real reason to fear that it might lose its loans. In an effort to circumvent this, the Bank under date of November 22nd, 1940, obtained from the Bankrupt an assignment of all moneys under the contract, but withheld filing it with the Secretary of War for his approval, or giving the surety notice, as required by the Federal Assignment of Claims Act. This was not because of ignorance, but was deliberate, inasmuch as the Bank knew filing was essential to the validity of the assignment. (R. 55). The concealment had for its objective the acquirement of the Government payment before the surety or the creditors were made aware of the contractor's precarious position. (R. 51).

On November 27th, 1940, the contractor received in Boston, Massachusetts, a Government check in the sum of $155,865.50, and at about 10 P. M. of the same day mailed the check to the respondent bank for deposit in the account of the contractor, and at the same time, and in the same mail, enclosed a check to the order of respondent bank in the sum of $150,000 in repayment of certain outstanding loans, $110,000 of which had matured, $40,000 of which was not due until December 9th, 1940. It is conceded that the records of the Bank indicate that on November 28th the

Government check was deposited in the bankrupt's account and that on November 28th the sum of $150,000 was withdrawn from the contractor's account in payment of its obligations to the respondent bank. This was only after the bankrupt had delivered its check for $150,000 to the order of the respondent. The bankrupt's notes were then cancelled and marked paid on November 28th. (Photostatic Exhibits R. 76 et seq.)

After the respondent had cancelled the outstanding loan of $150,000 on November 28th, it then notified the contractor that no loans would be made on the assignment unless the surety subordinated its rights to those of the respondent as regards all subsequent payments from the Government (R. 52-53).

The assignment was not filed with the four agencies as required by the Federal Assignment of Claims Act until December 4th, 1940 and was not approved by the Secretary of War until December 5th, 1940 (R. 22). The petition in bankruptcy was filed on March 28th, 1942 *exactly four months within the date of the repayment of the $150,000 to the respondent bank.*

Accordingly an action was commenced by the Trustee in Bankruptcy to set aside the payment of $150,000 made on November 28th, 1940 on the ground that it was made within four months of the filing of the petition in bankruptcy and preferential within the meaning of Section 60-a of the Bankruptcy Act.

The Bank thereupon moved for judgment dismissing the complaint on the ground that the transfer had not occurred within the four month period (R. 66; 71). The respondent in effect claimed that it had a right to the moneys as of November 22nd, the date it received the assignment.

The Trustee contended that assignments of moneys due under a Federal contract were void as against a Trustee in Bankruptcy, unless the assignment had been filed and approved as provided by the Assignment of Claims Act, more than four months prior to bankruptcy. Also the Trustee contended that the doctrine of "relation back" or "equitable assignment" could not be invoked in order to give the assignment validity as of the date of its delivery without the four month period if the statutory requisites as to filing had not been complied with until a date within the four month period. The Court of Appeals held that the assignment effected an inchoate transfer and that if the filing statute was subsequently complied with—the assignment acquired a retroactive finality on the theory of "relation back."

Jurisdiction of This Court to Grant Certiorari.

Jurisdiction of this Court to review the aforesaid judgment is granted by Section 237(b) of the Judicial Code, 28 U. S. C. 344(b).

The decision sought to be reviewed was rendered by the Court of Appeals of the State of New York, the highest Court of that State.

The decision concerned itself almost solely with Federal Statutes and the opinions of this Court construing Federal Statutes.

This application is made within the three months allowed by 28 U.S.C. 350. The order of the Court of Appeals was rendered April 13th, 1944. In conformity with the Civil Practice Act of New York, the judgment of the Court of Appeals was made the judgment of the Supreme Court of the State of New York on April 19th, 1944.

Statutes Involved.

The Federal Statutes involved will be found in the appendix. They are:

1. Sec. 3477 of the Revised Statutes, 31 U.S.C. 203 as amended by Assignment of Claims Act October 9th, 1940.

2. Section 60-a of the Bankruptcy Act as amended, 11 U.S.C. 96.

Questions Presented.

(a) As against a Trustee in Bankruptcy is an assignment of moneys to become due under a Federal contract null and void under the rules laid down by this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345, unless and until the said assignment be filed and approved as provided by the Assignment of Claims Act, *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434.

(b) Did the decision of this Court in *Martin* v. *National Surety Co.*, 300 U. S. 588, overrule *National Bank of Commerce* v. *Downie*, 218 U. S. 345, wherein it was held that an assignment of Federal funds was void as against a Trustee in Bankruptcy who seeks to set aside the assignment as preferential.

(c) Where a Trustee in Bankruptcy seeks to set aside an assignment of Federal moneys as preferential within the meaning of Section 60-a of the Bankruptcy Act, does the four months period begin to run as of the date of the execution and delivery of the assignment, or as of the date the assignment was filed and approved as provided for by the Assignment of Claims Act.

(d) Did the Court of Appeals of the State of New York in effect refuse to recognize the holding of this Court in

Corn Exchange National Bank v. *Klauder*, 318 U. S. 434, that the doctrine of "relation back" was repudiated by the amendments to the Bankruptcy Act effective in 1938, when the said Court of Appeals held that where an assignment was subsequently filed and approved as provided for in the Assignment of Claims Act its effectiveness related back to the date of its execution and delivery.

(e) Did the Court of Appeals properly apply the test of what constitutes a perfected transfer of Federal moneys within the meaning of Section 60-a of the Bankruptcy Act and as construed by this Court in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434.

Reasons for Granting Petition.

The Court of Appeals has passed on most important Federal questions of substance affecting rights under the "Assignment of Claims Act," being amendment to 31 U. S. C. 203, and Section 60-a of the Bankruptcy Act. The Court of Appeals has held that although an assignment of moneys to become due under a Federal contract may be invalid unless filed, nevertheless, once filed, the assignment has retroactive validity as of the date of its delivery, and that this is so against a Trustee in Bankruptcy. In so holding, the Court of Appeals invoked both the doctrine of "relation back" and "inchoate assignments" both of which were expressly repudiated by this Court in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434. To make the conflict still more inexplicable, the Court of Appeals cited *Corn Exchange National Bank* v. *Klauder* (*supra*) in support of its decision.

The Court of Appeals improperly held that no bonafide purchaser or creditor could acquire superior rights in the property assigned between the date of the execution of the assignment and the date of filing, as provided for by the Assignment of Claims Act.

The Court of Appeals failed to give recognition to the fact that the Bankrupt could make no valid assignment in view of a prior assignment to the Surety for the bankrupt, although similar assignments to sureties have been recognized by this Court in *Martin* v. *National Surety*, 300 U. S. 588, as superior to subsequent assignees.

The holding of the Court of Appeals is in direct conflict with the opinion of this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345.

The questions presented are of widespread importance to Banks, Contractors, Surety Companies and Bankruptcy Trustees throughout the country. In the last few years, due to large number of government construction contracts and defaults arising therefrom, many serious questions have arisen as to the effect of the Assignment of Claims Act of October 9th, 1940, on assignments of Government funds and the respective rights of Sureties, Banking Institutions and Creditors.

As matters now stand the opinion of the Court of Appeals is the only opinion on the question to which one may look for guidance. It is significant that although the Court of Appeals affirmed the Appellate Division, it did not agree with its opinion and entirely disregarded that part which held filing wholly unnecessary. Thus, as matters now stand, there seems to be disagreement even between the Appellate Courts of New York although they have both come to the same result.

Summary Statement of Matters Involved.

This case presents:

(1) The refusal of the Court of Appeals of the State of New York to grant the remedies provided for by Section 60-a of the Bankruptcy Act and as the same have been recently construed by this Court in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434.

(2) The refusal of the Court of Appeals of the State of New York to properly construe the rights and obligations arising out of the Assignment of Claims Act enacted October 9th, 1940, amending Section 3477 of the Revised Statutes, 31 U. S. C. A. Section 203.

(3) The refusal of the Court of Appeals of the State of New York to properly apply the law pertaining to rights flowing from unfiled assignments where statutes provide for filing and notice and the rights of a Trustee in Bankruptcy as enunciated by this Court in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434.

(4) The refusal of the Court of Appeals to follow the opinion of this Court in *Corn Exchange National Bank* v. *Klauder* (supra) that failure to record an assignment where there is a statutory requirement to record renders the transfer ineffective as against a Trustee in Bankruptcy until the assignment is actually filed and the rights of the assignee are to be judged as of the date of filing.

Conclusion.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out and under the seal of this Court directed to the Court of Appeals of the State of New York to the end that the judgment of the Court of Appeals may be reviewed and reversed, and for such other and further relief as may be just and proper.

Dated: ——

M. Carl Levine,
David Morgulas,
Attorneys for Petitioner,
521 Fifth Avenue,
New York City.

David Morgulas,
Of Counsel.

APPENDIX.

Statutes Involved.

R. S. 3477, Sec. 203, Title 31, U. S. C. Money and Finance.

All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be absolutely null and void, unless they are fully made—after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Amendment to Section 3477, Revised Statutes (October 9, 1940)

(Public No. 811, 76th Congress.)

(Chapter 779, 3d Session.)

(H. R. 10464.)

An Act.

To assist in the National Defense Program by Amending Sections 3477 and 3737 of the Revised Statutes to Permit the Assignment of Claims Under Public Contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 3477 and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: PROVIDED,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of

1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

"3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with

"(a) the General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

Sec. 2. This Act may be cited as the "Assignment of Claims Act of 1940".

Approved, October 9, 1940.

Section 60-a of the Bankruptcy Act as amended by the Chandler Act of June 22nd, 1938, 52 Stats. 840, 869-870; 11 U. S. C. Sec. 96-a.

§ 60. PREFERRED CREDITORS.—a. A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter X, XI, XII or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 188

ALBERT E. McKENZIE, AS TRUSTEE IN BANKRUPTCY OF GRAVES-QUINN CORP.,

Petitioner,

against

IRVING TRUST COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT I.

Until the Respondent Complied with Section 3477 of the Revised Statutes as Amended October 9th, 1940, the Assignment Was Null and Void.

The Court of Appeals held that the statute does not in express terms declare that an assignment is wholly void until it has been filed and consent given. In so holding the Court committed serious error. Prior to October 9th, 1940, assignment of claims against the United States were *absolutely null and void* in accordance with the express statutory language of Section 3477 of the Revised Statutes (31 U. S. C. A. Sec. 203).

The section was amended under date of October 9th, 1940 (Public Law 811 of the 76th Congress). The amendment is set forth in full in the appendix. It clearly states that as to contracts executed prior to the date of its enactment, (the contract in suit being executed September 14th, 1940), assignments may be taken out of the realm of nullity provided certain conditions are complied with, viz:

1. The assignment must be filed with the consent of the Head of the Department concerned.

2. The assignee shall file written notice thereof and file a true copy thereof in various Governmental offices, plus *the surety on the contractor's bond.*

Thus, it was not only the evident purpose of the amendment to provide certain exceptional circumstances where an assignment might be given validity but in requiring notice to the surety it was the evident purpose of the amendment to strike down any secret assignments.

Up to the time the respondent complied with the amendment of October 9th, 1940, its right must of necessity be judged under the old statute. The rule in bankruptcy, with respect to assignments of the instant character under the old statute was specifically stated by this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345 to be that such an assignment was void as against a Trustee in Bankruptcy who sought to set it aside as preferential. That case is a specific authority that as between the assignee and Trustee in Bankruptcy the assignment is absolutely null and void. The Court of Appeals apparently disregarded the *Downie* case evidently on the assumption that its force was dissipated by the opinion of this Court in *Martin* v. *National Surety Company*, 300 U. S. 588.

We respectfully submit that although the *Martin* case liberalizes the rule under the special circumstances there

present, it did not involve bankruptcy principles and this Court specifically pointed out that it did not intend to overrule the *Downie* case.

In this connection, we might point out that the only Federal decision attempting to reconcile the aforesaid two opinions of this Court is *In Re Meadow Sweet Farms*; 32 Fed. Supp. 119 decided in the District Court for the Western District of New York, wherein the Court said:

> "The assignments did not comply with the provisions of Section 203, Title 31, U. S. C. A., which section prescribes requirements for valid assignments of claims against the United States. The claims were not allowed by the government when the assignments were made and warrants did not issue thereon until after the adjudication in bankruptcy.
>
> The evidence fairly establishes that the assignments were made for a present consideration and that no preference was created. The decision here turns on the interpretation of the statute regarding assignments (supra). The Supreme Court held in National Bank v. Downie, 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065, 20 Ann. Cas. 1116, where the controversy as to the right to the fund was, as here, between a trustee in bankruptcy and a prior assignee, that assignments not in accordance with the statute were null and void. In Martin v. National Surety Company, 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822, the Court announced a more liberal view of the statute under other circumstances, but did not overrule the Downie case. I think the Downie case must control."

POINT II.

The Assignment Was Not Effective Until At Least December 2nd, 1940; Within the Meaning of Section 60-a of the Bankruptcy Act.

Corn Exchange National Bank v. *Klauder*, 318 U. S. 434.

In *Corn Exchange National Bank* v. *Klauder* (supra) this Court definitely held that failure to record rendered an assignment void against a Trustee and that the test of what constitutes a preferential transfer under Section 60-a of the Bankruptcy Act must be considered in light of the contemplated purpose of striking down secret liens.

It was the evident purpose of the amendment to the Assignment of Claims Act of October 9th, 1940, to not only compel filing, if any validity was to be given to the assignment, but further to give notice not only to various Governmental agencies but to the principal and largest potential creditor, to wit, the Surety Company. The Miller Act (40 U. S. C. 270) requires every contractor to furnish a surety company bond guaranteeing the payment of labor and materials, and as such the surety company always has a most vital interest in the disposition of any of the Government funds. In that capacity it represents practically all of the various creditors on the specific job because if failure occurs, it is the surety that is called on to pay and steps into the rights of practically all creditors.

That the respondent kept the assignment secret, although it knew that filing was required, is undisputed (R. 55). That the purpose of respondent's secrecy was to ward off suspicion of Surety and Creditors until respondent was repaid is also evident (R. 51). In *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434, this Court condemned such secrecy where notice was required only to the *debtor*. How much more applicable is the expressed purpose of Section

60-a of the Bankruptcy Act to strike down secret assignments where a Federal Statute not only requires filing but notice to the largest creditor—the Surety. Yet the Court of Appeals ignored the admonition of this Court in the *Klauder* case and condoned secret assignments by invocation of the repudiated doctrine of "relation back".

In applying the test, the Court of Appeals went completely astray IN HOLDING (292 N. Y. 347 at 358-9):

> "The appellant, however, fails to point out any rule whereby a bona-fide purchaser for value or a creditor could have any rights in the moneys which might become due under the contract before they were paid to the contractor or its assignee, except perhaps a lienor under the provisions of the Lien Law of this State".

We must then ask ourselves whether any bona-fide purchaser for value or any creditor could have any rights in the Government moneys before or after payment to the assignee.

Let us first apply the test as to the right of creditors against the respondent if bankruptcy occurred prior to the receipt of the Government check. Every Federal authority that we have been able to find is directly to the effect that any creditor furnishing labor and materials as well as the surety company would have a right to the Government fund prior to and superior to the right of the assignee bank

American Surety Company v. *Westinghouse Electric Co.*, 296 U. S. 133;
Jenkins v. *National Surety Co.*, 277 U. S. 258;
Prairie State Bank v. *U. S.*, 164 U. S. 227.

Even if the assignee actually received the money and the same were traceable that superior right would still exist.

Martin v. *National Surety Company*, 300 U. S. 588;
Cox v. *New England Equitable Insurance Co.*, 247 Fed. 955.

Neither the respondent bank nor any one else ever contended that a bona-fide purchaser who took an assignment and obtained the consent of the War Department, and advanced moneys thereon, would not have a superior right to the respondent bank with its unfiled assignment given for a past consideration. The right of a bona-fide purchaser as against a prior assignee of a Government claim where filing was provided for was expressly upheld in

Judson v. *Corcoran*, 58 U. S. (Howard) 612.

It was there most directly held that a second assignee who gives notice to the Government, where notice is permitted, and thereafter collects, is entitled to the fund as against the first assignee. It is also highly significant that the *Judson* case was cited with approval in *Salem* v. *Manufacturers Finance Co.*, 264 U. S. 182, urged by respondent and cited by the Court below.

The Court of Appeals relied on *Salem Trust Company* v. *Manufacturers Finance Company*, 264 U. S. 182 (where no filing statute and only a simple assignment was involved), for the proposition that filing of the assignment at bar was unnecessary. The Salem opinion clearly indicates that it is limited to the rights of successive assignees where no notice to the debtor is required or permitted by statute. The Court below also completely overlooked the essential distinction that the cited case had nothing to do with the question as to when an assignment might be deemed to be perfected within the meaning of the Bankruptcy Laws. That express distinction was pointed out in *Corn Exchange National Bank* v. *Klauder* (supra), wherein this Court said in footnote 8 to its opinion:

> "The decision in Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, that, as a matter of 'general law', absence of notice to the debtor of the assignment

of his account did not open the door to a subsequent assignee to obtain superior rights was not rendered in a bankruptcy case and is in any event inapplicable since the decision in the Tompkins case."

POINT III.

The Doctrine of "Relation Back" Was Specifically Repudiated by This Court in Corn Exchange National Bank v. Klauder, 318 U. S. 434.

The Court of Appeals held that the delivery of the assignment before filing created an inchoate transfer of the assigned rights, and that once filed the assignment was given validity as of its original date of delivery. This holding is directly contrary to the letter and spirit of Section 60a of the Bankruptcy Act and to the holding of this Court in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434.

We need go no further to indicate the error of that position than the footnote No. 11 to this Court's opinion in *Corn Exchange National Bank* v. *Klauder* (supra), viz.:

> "See statement of Professor McLaughlin, Hearings, Revision of the Bankruptcy Act, House Judiciary Committee, 75th Cong., 1st Sess., pp. 122-125. He stated Thompson v. Fairbanks, 196 U. S. 516, as applying a rule of state law that a mortgagee by taking possession of the mortgaged property at a time subsequent to the execution of the mortgage thereby validated it as of the time of execution. He said that Sec. 60(a) would prevent such validation by relation back. Similar disapproving reference was made to Bailey v. Baker Ice Machine Co., 239 U. S. 268; Carey v. Donohue, 240 U. S. 430; and Martin v. Commercial National Bank, 245 U. S. 513; with the explanation that 'You are going to have taken away some advantages that some people have enjoyed, and certain practices are going to be altered to some extent. But you have that every time you pass any kind of a commercial law'."

In commenting on the effect of the *Klauder* case on the doctrine of "relation back" the note in Collier on Bankruptcy, 14th Ed. Supplement (1943), 60.38, page 895, note 24 is most instructive:

> "The doctrine of 'relation back' a device which permitted many a secret lien to escape the effects of Section 60 prior to the 1938 Act is dead."

It is highly significant that even the respondent conceded in the Court below that in the absence of the filing of the assignment and the consent by the Secretary of War, it would have no right under the assignment. It attempts to accomplish the right under the assignment *ab initio* on the theory of "relation back" and the Court of Appeals put its stamp of approval on that theory directly contrary to the decision of this Court in *Corn Exchange National Bank* v. *Klauder* (*supra*).

The Court below stated that when the contractor received the check on November 27th it was in good faith bound to deliver the same to the respondent in accordance with the executed assignment. That erroneously presupposes that the assignment was valid for nowhere else can the source of any legal liability be directed. In so holding the Court of Appeals entirely misconceived the purport of Section 60-a of the Bankruptcy Act, for under that Section the Trustee could have intervened on November 27th and prevented the payment. At that time there was no such perfected assignment as would prevent the Trustee from acquiring a superior right. It is entirely immaterial what would have been the respective obligations as between assignor and assignee, if no one else had a right to intervene, but to say that the contractor was bound to deliver the check to respondent bank on November 27th is to beg the very question involved, which is: Could a Trustee in Bankruptcy have prevented such a transfer on November

27th, or could the surety company, *a creditor*, which had a prior assignment, have prevented a transfer on that day; or could a bona-fide purchaser have acquired a superior right? The Court below entirely overlooked the fact that on November 27th the surety company was actually a creditor, and that in effect, the moneys in question belonged to it, unless its rights were affected by actual compliance with the Assignment of Claims Act. It further completely disregarded the potentiality that a bona-fide purchaser could have acquired a superior right.

Point IV.

On November 22nd the Bankrupt, Having Previously Assigned to the Standard Accident & Surety Company, Had No Power to Make An Assignment to the Respondent, and at Least Until the Respondent Complied With Filing Requirements, the Surety's Rights Were Superior under the Doctrine of Martin v. National Surety, 300 U. S. 588.

Let us for the moment assume respondent's contention that no filing was necessary. Still respondent must fail for there was a prior valid assignment which would bar respondent's claim of title to the money, because on plaintiff's own theory, the bankrupt, having first parted with title, had nothing to assign. We refer to the prior assignment to the Standard Accident Insurance Company.

The fact is, that on October 2nd, 1940, seven weeks prior to the respondent's assignment, the bankrupt had already made an assignment of the same funds to the Standard Accident Insurance Company (217). It was the usual assignment contained in the indemnity agreement given by a contractor to his surety upon the issuance and delivery of a performance and payment bond. We deal here with an assignment identical to that which this Court recognized in *Martin* v. *National Surety* (supra) as creating rights and

equities superior to those of a subsequent assignee to whom the Government actually paid the contract balance. It has been repeatedly held that the surety company's rights are paramount, and date as of the date of the original indemnity and assignment agreement. In *Barnett* v. *Maryland Casualty*, 134 F. (2d) 725 (certiorari denied 320 U. S. 740), the Court, in characterizing a similar assignment to a surety, said:

> "The assignment involved here is from its terms a present assignment and not a mere promise to assign in the future."

Thus, in our case, a prior assignment having been made to the surety on October 2nd, 1940, and the surety being a creditor, the Court of Appeals was in error in holding that the assignment to respondent on November 22nd, 1940, per se, gave it exclusive and unquestioned right to the fund superior to any other creditor.

The record is clear that the contractor had failed to pay its bills long prior to November 22nd, 1940. This was a default within the meaning of the indemnity agreement, and the assignment was effective under the doctrine of the *Barnett* case (supra), at least by November 22nd, if not as of the date of the indemnity agreement (September 14th, 1940).

The Court below entirely misconceived the effect of the assignment to the surety company, stating, at the conclusion of its opinion, that it would give no heed to the alleged rights of the surety, inasmuch as the Trustee in Bankruptcy had no authority to bring an action to establish a superior title in some other person. *This evaded the very purpose of the petitioner in urging the assignment to the surety company. Our evident purpose was to show that the surety company was a creditor, and that under Section 60-a of*

the Bankruptcy Act could have intervened and demanded the moneys at all times and even have traced the fund directly into the hands of the Bank, unless its rights had been cut off when the Bank complied with the Assignment of Claims Act. Certainly the surety was a creditor within the meaning of Section 60-a of the Bankruptcy Act. As a matter of fact, the very Assignment of Claims Act provided that notice must be given to the surety, for it was the evident purpose of the Act to prevent secret assignments against the interest of sureties. Had the surety known of the assignment prior to the actual receipt of the moneys by the Bank, it needs little argument to realize that the surety would have caused a petition in bankruptcy to have been immediately filed, in order to prevent the unlawful diversion of $150,000. Under Section 60-a of the Bankruptcy Act the Trustee has the right to assume the position of every conceivable creditor, whose rights become those of the Trustee.

Point V.

The Assignment in Question, Involving a Contract and Warrant of the United States, Federal Law and Not State Law, was Applicable.

It is difficult to understand whether the Court of Appeals applied the standards of State or Federal law. In *Corn Exchange National Bank & Trust Co. v. Klauder*, 318 U. S. 434, this Court construed an assignment of moneys purportedly made in accordance with Pennsylvania statutes. In determining the effect of lack of notice of the assignment under the Pennsylvania statutes, this Court held that the standards which applicable State law would enforce against a purchaser for value must be applied. Seizing upon that phrase, the Court of Appeals

applied the State law test to the assignment of Federal moneys at bar, stating (292 N. Y. 347 at 358):

> "The 'standards which applicable State law would enforce against a purchaser for value' or against a creditor must be applied here. (Corn Exchange National Bank & Trust Co. v. Klauder, 318 U. S. 434.)"

The Court was in error. It should have applied the tests of Federal law, inasmuch as both a Federal statute and Federal moneys were involved.

Clearfield Trust Co. v. *United States*, 318 U. S. 363.

It would be an entirely different matter if Federal statutes did not require filing, and if Federal funds were not directly involved and their disbursement regulated by Federal statute.

POINT VI.

The Court Committed Serious Error in Disregarding the Book Entries of the Bank under Date of November 28th.

There was no question but that the bankrupt mailed the Government check to the respondent bank for deposit in the bankrupt's account, and that the moneys were so deposited on November 28th, exactly four months within the filing of the petition in bankruptcy. It is also undisputed that the bank withdrew $150,000 from the bankrupt's account on November 28th, in payment of its outstanding loans.

For some inexplicable reason, the Court below determined in its opinion that these transactions were to be disregarded, for the most fantastic reason, that they "merely constitute a record of the transaction in compliance with the directions of the contractor." Thus, instead of adhering to the record, the Court invoked the fiction that when the bankrupt actually received the check on November 27th, it held the same on behalf of the Bank by reason of the

assignment. Thus the Court below disregarded the actual and undisputed facts. The Court below completely disregarded that which was actually done in attempting to uphold the right of the Bank by reason of the assignment. The language of the Court in *In re National Lumber Co.*, 212 Fed. 928, at page 929, is most pertinent:

> "The parties chose to pay and to accept the money in the ordinary course of events, and their conduct is to be judged by what they did, not by what they might have done. Bank v. Campbell, 81 U. S. (14 Wall.) 87, 20 L. Ed. 832."

Irrespective of the effective date of the assignment it is our contention that the actual preference took place on November 28th. It is conceded that on November 27th the Bankrupt received in Boston the Government check payable to its order for $155,865.50, and late that evening mailed it to the respondent bank for deposit *in the Bankrupt's account*. It is undisputed that on November 28th the Bank actually deposited this check for $155,865.50 in the bankrupt's account, and that on the same day it accepted the check of the bankrupt drawn to the order of the respondent bank in the sum of $150,000, and on November 28th withdrew that amount from the bankrupt's account and cancelled four promissory notes of the bankrupt totalling $150,000.

If the respondent had acted on the assignment, and regarded the Government check as its property, it would not have deposited the Government check to the bankrupt's credit and account, and then gone through the additional step of having the bankrupt make out a check for $150,000 to the respondent's order so that the respondent might cancel $150,000 of the outstanding notes of the bankrupt; $100,000 of which were payable on demand, and $50,000 not due until December 9th (228). The moment the Government check was deposited in the bankrupt's account, the

money belonged to the bankrupt—a debtor and creditor relationship had already arisen. No matter what previous claim the Bank had to the Government check, it had relinquished it. On November 28th the proceeds were in the bankrupt's name, and it was obviously necessary for the Bankrupt to take some affirmative step to dispose of the $150,000. That is why the Bankrupt issued its check.

If what the respondent contends were actually in the contemplation of the respondent, it never would have deposited the Government's check in the Bankrupt's account. The fact is that the Bank knew on November 22nd, the date it received the assignment, that it could not become effective until the Bank obtained the consent of the Secretary of War (164).

While it is our contention that the fact of the deposit of the check in the Bankrupt's account and the subsequent payment on November 28th, are conclusive as to the date of the payment, thus rendering a consideration as to the date of the effectiveness of the assignment immaterial, we, nevertheless, contend that in no event could the assignment be given legal effect within the meaning of the Bankruptcy Act until the respondent complied with the Assignment of Claims Act of October 9th, 1940, both as to filing and approval of the Secretary of War.

Respectfully submitted,

M. Carl Levine,
David Morgulas,
Attorneys for Petitioner,
521 Fifth Avenue,
New York City.

David Morgulas,
Of Counsel.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 188.

In the Matter of

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION,

Petitioner,

—against—

IRVING TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

DAVID MORGULAS,
Counsel for Petitioner.

M. CARL LEVINE,
ALBERT FOREMAN,
Of Counsel.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys,
Office & Post Office Address,
521 Fifth Avenue,
Borough of Manhattan,
New York, N. Y.

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The Standard Accident and Insurance Company was a creditor who had and acquired rights in the property transferred prior to the time the respondent complied with the filing and notice requirements of the Assignment of Claims Act. Accordingly, the assignment to respondent was not perfected as against the Trustee until at least December 2nd, 1940 20-22

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Supreme Court of the United States

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION,

Petitioner,

—*against*—

IRVING TRUST COMPANY,

Respondent.

BRIEF FOR PETITIONER

Opinions Below.

The opinions below officially reported are those of the Appellate Division of the Supreme Court of the State of New York at 266 App. Div. 699, and the opinion of the Court of Appeals of the State of New York, at 292 N. Y. 347. The opinion at Special Term of the Supreme Court, New York County is not officially reported and appears in the Record at pages 59 to 62, inclusive.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, 28 U. S. C. 344 (b). The order of the Court of Appeals was rendered April 13, 1944. The petitioner's application for a Writ of Certiorari was filed June 23, 1944, and the Writ was granted October 9, 1944.

History of the Case.

This action was originally brought by petitioner predicated on two causes of action (R. 22). The first cause of action sought to set aside a transfer of $150,000. made by the bankrupt to the respondent as being preferential within the meaning of Section 60-a of the Bankruptcy Act. The second cause of action sought to nullify the transfer on the ground that it was void within the meaning of Section 15 of the Stock Corporation Law of the State of New York.

Prior to the judgment of the Court of Appeals of the State of New York, the second cause of action was severed by order of the Supreme Court of the State of New York, so that the instant action might proceed as if only the first cause of action had been instituted, and the instant judgment final (R. 64). Accordingly, we will proceed on the theory that the action concerns itself *ab inito* only with the first cause of action.

After issue had been joined, respondent moved for summary judgment as permitted by Section 113 of the Rules of Civil Practice of the State of New York (R. 3). The respondent's motion for judgment was on the sole ground that the transfer did not take place within four months of the bankruptcy petition.[1] It was heard at a Special Term of the Supreme Court of the State of New York and the motion denied on the ground that the alleged preference did occur within the four months period. The respondent then appealed to the Appellate Division of the Supreme

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1 The reply affidavit of Wm. A. Onderdonk makes this clear at (R. 47-48):

> "We are not, however, on this motion trying all the issues raised by the pleadings. We are concerned with only one. The Court is asked to determine if as a matter of law the transfer complained of did not occur more than four months before the filing of the petition".

Court of the State of New York (R. 4) which reversed the order of the Special Term and judgment was rendered for the respondent dismissing the complaint (R. 65). Your petitioner thereupon appealed to the Court of Appeals where the judgment of the Appellate Division was unanimously affirmed.

Application was then made to this Court for a Writ of Certiorari which was granted October 9, 1944.

Statement of the Case.

Facts.

The complaint is briefly to the effect that on November 28, 1940, exactly within four months of the filing of the involuntary petition in bankruptcy, the bankrupt, while insolvent, made a transfer of $150,000 to the respondent bank for a past consideration at a time when the latter had reasonable cause to believe that the bankrupt was insolvent within the meaning of Section 60-a of the Bankruptcy Act.

In September of 1940, the Bankrupt entered into a contract with the United States for the construction of military housing facilities at a price of $1,008,800. The Standard Accident & Insurance Company delivered its performance and payment bond to the Government and simultaneously therewith and under date of October 2nd received an assignment from the Bankrupt of all funds to become due from the Government (R. 50B&C). On October 24th, 1940 the contractor borrowed $40,000 from Respondent for a 10-day period, the Respondent expecting repayment within a week (R. 32). On November 15th, 1940 the contractor was indebted to the respondent for about $85,000 (R. 32). At this point it clearly appeared that the contractor was in financial difficulty and the respondent feared that if work stopped,

the surety company might step in and complete the construction and at the same time obtain all payments from the Government. In order, therefore, to lend an appearance of normalcy, the respondent continued to lend the contractor more money with the intent of seizing the next payment to become due from the Government before the surety's attention could be drawn to the contractor's financial difficulties. The respondent's officers then started a series of discussions as to how they might best extricate themselves from their precarious situation (R. 33).

Toward the end of November, 1940 the Government was considering a substantial progress payment to the Contractor. At that time many of the subcontractors were unpaid (R. 49). The respondent's officers feared, and with justification, that the surety company might at that moment step in and take over the job under its right of subrogation and receive all Government payments. The Bank had real reason to fear that it might lose its loans. In an effort to circumvent this, the Bank under date of November 22nd, 1940, obtained from the Bankrupt an assignment of all moneys under the contract, but withheld filing it with the Secretary of War for his approval, or giving the surety notice, as required by the Federal Assignment of Claims Act. This was not because of ignorance, but was deliberate, inasmuch as the Bank knew filing was essential to the validity of the assignment.*

The concealment had for its objective the acquirement of the Government payment before the surety or the cred-

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* This appears in respondent's own inter-office memorandum of November 15, discovered at respondent's examination before trial, viz.: (R. 36)

> "They are willing to assign the contract to us but as it is dated prior to the date of the Act authorizing the assignment of Government contracts the consent of the Government will be required."

itors were made aware of the contractor's precarious position.**

On November 27th, 1940, the contractor received at Boston, a Government check in the sum of $155,865.50, and at about 10 P. M. of the same day mailed the check to the respondent bank for deposit in the account of the contractor, and at the same time, and in the same mail, enclosed a check to the order of respondent bank in the sum of $150,000 in repayment of certain outstanding loans, $110,000 of which had matured, $40,000 of which was not due until December 9th, 1940.

The respondent's anxiety about receiving the check lest anything happen in the interim, was so great that respondent did not even trust the ordinary processes of mail delivery. Respondent's inter-office memorandum of November 28th states: (R. 34)

> "We had sent a special messenger to the post office at various times, we had been unable to obtain the check * * * about 2 o'clock the check arrived. The envelope bore Boston post mark (10 P. M.) yesterday."

It is also conceded that the records of the Bank indicate that on November 28th the Government check was deposited in the bankrupt's account and that on November 28th the sum of $150,000 was withdrawn from the contractor's account in payment of its note obligations to the respondent. This was only after the Bankrupt had delivered its check

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** This also clearly appears from the respondent's own memorandum of November 27, viz.: (R. 33)

> "Messrs. Cobb, Petersen, Keenan and the writer discussed this case and arrived at the decision that upon receipt of the check covering November 18th requisition, which would repay company's indebtedness to us, we should inform them of our unwillingness to make any further advances unless the surety companies would give us some satisfactory undertaking not to come between us and payments due Graves-Quinn under the contract, which have been assigned to us".

for $150,000 to the order of the respondent. The bankrupt's notes were then cancelled and marked paid on November 28th (R. 53-58).

The assignment was not filed with the four agencies as required by the Federal Assignment of Claims Act until December 2nd, 1940, and was not approved by the Secretary of War until December 5th, 1940 (R. 13-14). The petition in bankruptcy was filed on March 28th, 1942, exactly four months within the date of the repayment of the $150,000 to the respondent bank.

The Issue.

The Trustee contends that an assignment of moneys due under a Federal contract as collateral for a past indebtedness is void as against a Trustee in Bankruptcy, unless the assignment is filed and approved and notice given as provided by the Assignment of Claims Act, more than four months prior to bankruptcy. The Trustee contends that the doctrine of "relation back" or "inchoate assignment" can not be invoked in order to give the assignment validity as of the date of its delivery without the four month period if the statutory requisites as to filing and notice had not been complied with until a date within the four month period. The Court of Appeals held that the assignment effected an inchoate transfer and that if the filing statute was subsequently complied with—the assignment acquired a retroactive finality on the theory of "relation back." The Trustee urges that this is contrary to the word and meaning of Section 60-a of the Bankruptcy Act as it was expounded by this Court in *Corn Exchange Nat. Bank & Trust Co.* v. *Klauder*, 318 U.S. 434. The date of the validity of the assignment as against the Trustee is of paramount importance since the assignment was patently for a past consideration.

Specification of Errors.

The New York Court of Appeals erred:

1. In holding that although an assignment of moneys to become due under a Federal contract may be invalid unless filed, nevertheless, once filed the assignment has retroactive validity as of the date of its delivery as against a Trustee in Bankruptcy.

2. In holding that no bona fide purchaser or creditor could acquire superior rights to the Federal moneys so assigned between the date of the execution of the assignment and the date of filing and giving of notice as provided for by the Assignment of Claims Act.

3. In holding that an unfiled assignment of Federal moneys takes precedent over a prior assignment to the surety for the bankrupt under the Federal contract in question.

4. In holding that the doctrine of inchoate assignment or "relation back" insofar as it may apply to the assignment of Federal moneys was not repudiated by this Court in *Corn Exchange Bank* v. *Klauder*, 318 U. S. 434.

Statutes Involved.

The relevant parts of the Statutes having an important bearing on the case are set out in Appendix "A" annexed to this brief.

Summary of Argument.

Until the respondent complied with Section 3477 of the Revised Statutes as amended October 9, 1940, the assignment to respondent was null and void (I, pp. 8 to 13).

The assignment was not effective until at least December 2, 1940, within the meaning of Section 60-a of the Bankruptcy Act (II, pp. 14 to 17).

The doctrine of "relation back" was repudiated by this Court in *Klauder v. Corn Exchange Bank*, 318 U. S. 434 (III, pp. 18 to 19).

On November 22nd the Bankrupt, having previously assigned to the Standard Accident & Surety Company, had no power to make an assignment to the respondent, and at least until the respondent complied with filing and notice requirments, the surety's rights were superior under the doctrine of *Martin v. National Surety*, 300 U. S. 588 (IV, pp. 20 to 22).

The assignment in question, involving a contract and warrant of the United States, Federal Law and not State Law, was applicable (V, pp. 22 to 24).

The Court committed serious error in disregarding the book entries of the Bank under date of November 28th VI, pp. 24 to 26).

POINT I.

Until the respondent complied with Section 3477 of the Revised Statutes as amended October 9, 1940, the assignment was null and void as against the Trustee in Bankruptcy.

Prior to October 9th, 1940, assignment of claims against the United States were absolutely null and void in accordance with the express statutory language of Section 3477 of the Revised Statutes (31 U. S. C. A. Sec. 203).*

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* The statute provides:

> "All transfers and assignments made of any claims upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be ABSOLUTELY null and void, unless they are freely made—after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof * * *."

The section was amended under date of October 9th, 1940 (Public Law 811 of the 76th Congress).* The amendment is set forth in full in the appendix. It clearly states that as to contracts executed prior to the date of its enactment (the contract in suit being executed September 14th, 1940), assignments may be taken out of the realm of nullity provided certain conditions are complied with, viz:

1. The assignment must have the consent of the Head of the Department concerned.

2. The assignee shall file written notice thereof and file a true copy thereof in various Governmental offices; *plus the surety on the contractor's bond.*

Thus, it was not only the evident purpose of the amendment to provide certain exceptional circumstances where an assignment might be given validity but in requiring notice to the surety it was the evident purpose of the amendment to strike down any secret assignments.

It is also highly significant that when the amendment to the Assignment of Claims Act was passed by Congress on October 9, 1940, the Federal Reserve Banks issued circular letters to their respective member banks warning them of the necessity of giving notice of assignment in order to make their assignments effective.

> "It is the consensus of opinion that the filing of notice of assignment together with a true copy of the instrument of assignment must be filed with each party designated in the proviso numbered 4 of the Act, as a prerequisite to the validity of assignment of claims due or to become due under a Government contract."

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* Now known as the "Assignment of Claims Act".

(Section 26254.2, page 26210 of Prentice Hall "National Defense & Government Contracts".)

At Section 26212, page 26203 of the same volume, appears a reference to the following bulletin No. 14686 of the Comptroller General's office issued February 4, 1941:

> "Necessity of strict compliance: An assignee who does not comply, at least substantially with the requirement of filing a written notice and a true copy of the assignment, would appear to have no enforceable right against the Government."

Up to the time respondent complied with the amendment of October 9, 1940, its rights must of necessity be judged under the old statute, no more, no less. As it read prior to October, 1940, Congress was most explicit. The statute did not stop at the usual phrasing "null and void", and as if that were insufficient warning Congress used the extreme admonition "absolutely null and void".

The rule in bankruptcy with respect to assignments of the instant character was enunciated by this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345, wherein the very question at bar was considered, namely, the effect of an assignment of Federal moneys as against the right of a trustee in bankruptcy. In the cited case, the plaintiff bank was a creditor, holding an assignment of certain claims which the bankrupt had against the Government. The referee in bankruptcy had ruled that as against the trustee in bankruptcy the assignment was valid. In reversing the referee in bankruptcy and holding the right of the trustee in bankruptcy superior to the bank, this Court said at page 351:

> "The words of that section are so clear and explicit that there cannot be, we think, any reasonable ground

to doubt the purpose of this legislation. Its essential features are not new, as can be seen by an examination of the Act of Congress of July 29, 1846, 'in relation to the payment of claims' on the United States, and the act of February 26th, 1853, 'to prevent frauds upon the treasury of the United States'. 9 Stat. 41, c. 66; 10 Stat. 170, c. 81. Turning to Sec. 3477, we find Congress had in mind not only all transfers and assignments of any claim on the United States, or part of a claim or any interest therein, whether the transfer or assignment be absolute or uncon''tional and whatever was the cause of the transfer or assignment, but all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof. All such transfers, assignments, powers of attorney, order of authorities are declared to be 'absolutely null and void', except there be a compliance with the conditions fully set out in the statute. None of these conditions was complied with in these cases."

The Court of Appeals apparently disregarded the *Downie* case on the assumption that its force was dissipated by the opinion of this Court in *Martin* v. *National Surety Company*, 300 U. S. 388.

We respectfully submit that although the *Martin* case liberalizes the rule under the special circumstances there present, it did not involve bankruptcy principles and this Court specifically pointed out that it did not intend to overrule the *Downie* case. In the *Martin* case this Court was dealing with a most special circumstance wherein it sought to prevent a fraud, and it accordingly invoked every equitable principle for the benefit of unpaid labor and materialmen and thereby upheld an assignment to a surety company. That this was the basis of this Court's decision is apparent from the following, viz. (p. 595):

"If the Government has any interest in the outcome of this controversy it is in sustaining the assignment to the surety rather than destroying it.* The contractor undertook that materialmen would receive their money promptly while the work was going on. In failing to pay them, he violated a duty to them, but a duty also to the Government, for the default was a breach of the condition of the bond. If the assignment to the surety creates a lien upon the fund, the contractor will be compelled to fulfill the duty thus assumed."

Our case presents a far different situation from that present in the *Martin* case. Here the appellant trustee seeks to invoke the protection of the Statute prohibiting assignments in order to prevent a fraud against creditors, *i.e.*, the consummation of the bank's illegal preference. In the *Martin* case the Statute was in large part disregarded because its protection was invoked by one who was guilty of fraud, not one who sought to avoid a fraud.

It is highly significant that what this Court was dealing with in the *Martin* case was not the rights of the ordinary assignee, but the policy of recognizing the rights of the surety as co-extensive with those of the Government or as this Court said (p. 597):

"Far from defeating or prejudicing the interests of the Government, the recognition of the equities growing out of the relation between the contractor and the surety will tend, as already has been suggested, to make those interests prevail" (p. 597).

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* The assignment is contained in the indemnity agreement which the contractor delivered to the surety company on receiving the construction bond required by statute (40 U. S. C. 270). It is almost identical with the assignment contained in the indemnity agreement given by the contractor in the instant case to the Standard Accident Ins. Co.

Two recent opinions deal with the apparent conflict between the *Downie* and *Martin* cases. In both, assignments of Federal moneys and rights of a Trustee in bankruptcy were involved. Each come to opposite conclusions. In *Meadow Sweet Farms, Inc.*, 32 Fed. Supp. 119, the Court held an assignment void as against a trustee, stating at page 119:

> "The Supreme Court held in National Bank v. Downie, 218 U. S. 345 * * * where the controversy as to the right to the fund was, as here, between a trustee in bankruptcy and a prior assignee, that assignments not in accordance with the statute were null and void. In Martin v. National Surety Company, 300 U. S. 588, * * * the Court announced a more liberal view of the statute under other circumstances, but did not overrule the Downie case. I think the Downie case must control."

In *Matter of Weber Motor Co.*, 52 Fed. Supp. 742, the Court upheld an assignment although it did not comply with Revised Statutes 3477 as amended October 9, 1940, stating at page 343:

> "The case upon which the trustee primarily relies, National Bank of Commerce v. Downie, 218 U. S. 345, * * * would seem to support his contention, but it is our opinion that the broad construction therein adopted must yield to the limited construction adopted by the Supreme Court in the case of Martin v. National Surety Co., supra. The later interpretation is clearly consistent with the language and purpose of the statute. Any distinctions between the cases which we should attempt to draw would be tenuous."

POINT II.

The assignment was not effective until at least December 2nd, 1940, within the meaning of Section 60-a of the Bankruptcy Act.

In *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434, this Court definitely held that failure to record rendered an assignment void as against a Trustee and that the test of what constitutes a preferential transfer under Section 60-a of the Bankruptcy Act must be considered in light of the contemplated purpose of striking down secret liens.

It was the evident purpose of the amendment to the Assignment of Claims Act of October 9th, 1940, to not only compel filing, if any validity was to be given to the assignment, but further to give notice not only to various Governmental agencies but to the principal and largest potential creditor, to wit, the Surety Company. The Miller Act (40 U. S. C. 270a) requires every contractor to furnish a surety company bond guaranteeing the payment of labor and materials, and as such the surety company always has a most vital interest in the disposition of any of the Government funds. In that capacity the surety represents practically all of the various creditors on the specific job because if failure occurs, it is the surety that is called on to pay and steps into the rights of practically all creditors.

The instant assignment was not filed until December 2nd, and consent was not obtained until December 5th. There is no contention that notice was given to anybody prior to December 2nd. On the contrary, the bank deliberately withheld filing to ward off suspicion of surety and creditors until it was repaid. If the surety knew of the assignment prior to receipt of the Government check for $155,865.50, it needs no argument to contemplate the immediate steps the surety would have taken to insure that the bank could not get preferential treatment.

Most applicable, therefore, is this Court's opinion in the *Klauder* Case that Congress by the 1938 amendment to Section 60-a of the Bankruptcy Act intended to strike down these secret financings.

Collier on Bankruptcy, 14th Ed., Vol. 3, Sec. 60, p. 892: aptly states the point:

> "The test is drawn so as to direct judicial investigation of the transfer to a time when such transfer has become, legally speaking, notorious or publicly known, and has lost any aspects of secrecy such as lack of recording or change of possession."

And again at page 898:

> "The result of the test is, of course, that there are two times of transfer, so to speak. As between the transferor and transferee obviously the time of transfer is the date of the original execution of the transaction, but as to creditors and the rest of the world, it is not a complete 'transfer' under Sec. 60 until the act has been done which by applicable law signifies to the world that the property interest transferred is no longer a part of the debtor's assets."

In the *Klauder* case this Court condemned such secrecy *where notice was required only to the debtor.* How much more obnoxious are secret assignments where a Federal Statute not only requires filing but *notice to the largest creditor—the Surety.* Yet the Court of Appeals ignored the admonition of this Court in the *Klauder* case and condoned secret assignments by invocation of the repudiated doctrine of "relation back".

In applying the test in our case the Court of Appeals went completely astray in holding (292 N. Y. 347 at 358-9):

> "The appellant, however, fails to point out any rule whereby a bona-fide purchaser for value or a creditor

could have any rights in the moneys which might become due under the contract before they were paid to the contractor or its assignee; except perhaps a lienor under the provisions of the Lien Law of this State."

This is patently wrong.

I. *As to Creditors.*

Let us first apply the test as to the right of creditors against the respondent if bankruptcy occurred prior to the receipt of the Government check. Every Federal authority that we have been able to find is directly to the effect that any creditor furnishing labor and materials as well as the surety company would have a right to the Government fund prior to and superior to the right of the assignee bank.

American Surety Company v. *Westinghouse Electric Co.*, 296 U. S. 133;
Jenkins v. *National Surety Co.*, 277 U. S. 258;
Prairie State Bank v. *U. S.*, 164 U. S. 227.

Even if the assignee actually received the money and the same were traceable that superior right would still exist.

Martin v. *National Surety Company*, 300 U. S. 588;
Cox v. *New England Equitable Insurance Co.*, 247 Fed. 955.

II. *As to Bona Fide Purchasers.*

Neither the respondent bank nor any one else ever contended that a bona-fide purchaser who took an assignment and obtained the consent of the War Department, and advanced moneys thereon, would not have a superior right to the respondent bank with its unfiled assignment given for a past consideration. The right of a bona-fide purchaser as

against a prior assignee of a Government claim where filing was provided for was expressly upheld in

Judson v. *Corcoran*, 58 U. S. (Howard) 612.

It was there most directly held that a second assignee who gives notice to the Government (where notice was permitted), and thereafter collects, is entitled to the fund as against the first assignee. It is also highly significant that the *Judson* case was cited with approval in *Salem* v. *Manufacturers Finance Co.*, 264 U. S. 182, urged by respondent and cited by the Court below.

The Court of Appeals relied on *Salem Trust Company* v. *Manufacturers Finance Company* (*supra*), (where no filing statute and only a simple assignment was involved), for the proposition that filing of the assignment at bar was unnecessary. The Salem opinion clearly indicates that it is limited to the rights of successive assignees where no notice to the debtor is required or permitted by statute. The Court below also completely overlooked the essential distinction that the Salem case had nothing to do with the question as to when an assignment might be deemed to be perfected within the meaning of the Bankruptcy Laws. That express distinction was pointed out in *Corn Exchange National Bank* v. *Klauder* (*supra*), wherein this Court said in footnote 8 to its opinion:

> "The decision in Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, that, as a matter of 'general law' absence of notice to the debtor of the assignment of his account did not open the door to a subsequent assignee to obtain superior rights was not rendered in a bankruptcy case and is in any event inapplicable since the decision in the Tompkins case."

POINT III.

The doctrine of "relation back" was specifically repudiated by this Court in *Klauder* v. *Corn Exchange Bank*, 318 U. S. 434.

The Court of Appeals held that the delivery of the assignment before filing created an inchoate transfer of the assigned rights, and that once filed the assignment was given validity as against the Trustee as of its original date of delivery. This holding is directly contrary to the letter and spirit of Section 60-a of the Bankruptcy Act and to the holding of this Court in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434.*

In referring to the effect of the *Klauder* case on the doctrine of "relation back" Moore's Collier on Bankruptcy, 14th Ed. Supplement (1943), 60.38 page 56, note 24 is most instructive:

> "The doctrine of 'relation back' a device which permitted many a secret lien to escape the effects of Section 60 prior to the 1938 Act is dead. The Supreme Court in Corn Exchange Nat. Bank & Trust Co. v. Klauder (supra) n. 21 took special note that the draftsmen of the 1938 Act expressed a firm intention to prevent its survival."

It is highly significant that even the respondent conceded in the Court below that in the absence of the filing of the assignment and the consent of the Secretary of War, it would have no right under the assignment. It attempts to accomplish the right under the assignment *ab initio* on the theory of "relation back" and the Court of Appeals put

* See footnote #1] to this Court's opinion in *Corn Exchange National Bank* v. *Klauder* (*supra*).

its stamp of approval on that theory directly contrary to the decision of this Court in *Klauder* v. *Corn Exchange National Bank* (*supra*).

The Court below stated that when the contractor received the check on November 27th it was in good faith bound to deliver the same to the respondent in accordance with the executed assignment. That erroneously presupposes that the assignment was valid, for nowhere else can the source of any legal liability be directed. In so holding the Court of Appeals entirely misconceived the purport of Section 60-a of the Bankruptcy Act, for under that Section the Trustee could have intervened on November 27th and prevented the payment. At that time there was no such perfected assignment as would prevent the Trustee from acquiring a superior right. It is entirely immaterial what would have been the respective obligations as between assignor and assignee, if no one else had a right to intervene, but to say that the contractor was bound to deliver the check to respondent bank on November 27th is to beg the very question involved, which is: Could the Trustee in Bankruptcy or any creditor have prevented such a transfer on November 27th, or could the surety company, a creditor, which had a prior assignment, have prevented a transfer on that day, or could a bona fide purchaser have acquired a superior right? The Court below entirely overlooked the fact that on November 27th the surety company was actually a creditor, and that in effect, the moneys in question belonged to it, unless its rights were affected by actual compliance with the Assignment of Claims Act. It further completely disregarded the potentiality that a bona-fide purchaser could have acquired a superior right.

POINT IV.

The Standard Accident and Insurance Company was a creditor who had and acquired rights in the property transferred prior to the time the respondent complied with the filing and notice requirements of the Assignment of Claims Act. Accordingly, the assignment to respondent was not perfected as against the trustee until at least December 2nd, 1940.

The Court of Appeals must have realized that the actual transfer of $150,000 took place on November 28th. The Court was, accordingly, compelled to adopt respondent's contention that filing was unnecessary, and that the unfiled assignment to the respondent imposed a duty on the bankrupt to turn over the Government funds to the respondent. The Court, however, wholly lost sight of the fact that this duty could exist only if there were no prior assignment outstanding by reason of which the bankrupt owed a superior duty to the prior assignee. If, therefore, respondent is correct in its argument that filing and notice were unnecessary, it must still fail for it is then faced with a prior valid outstanding assignment to the Standard Accident Insurance Company.

The fact is, that on October 2nd, 1940, seven weeks prior to the respondent's assignment, the bankrupt had already made an assignment of the same funds to the Standard Accident Insurance Company. It was the usual assignment contained in the indemnity agreement given by a contractor to his surety upon the issuance and delivery of a performance and payment bond. We deal here with an assignment identical to that which this Court recognized in *Martin* v. *National Surety* (*supra*) as creating rights and equities superior to those of a subsequent assignee to whom the Government actually paid the contract balance. It has been repeatedly held that the surety company's rights are paramount, and date

as of the date of the original indemnity and assignment agreement. In *Barnett* v. *Maryland Casualty*, 134 F. (2d) 725 (certiorari denied 320 U. S. 740), the Court, in characterizing a similar assignment to a surety, said:

> "The assignment involved here is from its terms a present assignment and not a mere promise to assign in the future."

Thus, in our case, a prior assignment having been made to the surety on October 2nd, 1940, and the surety being a creditor, the Court of Appeals was in error in holding that the assignment to respondent on November 22nd, 1940, *per se*, gave it exclusive and unquestioned right to the fund superior to any other creditor.

The record is clear that the contractor had failed to pay its bills long prior to November 22nd, 1940. This was a default within the meaning of the indemnity agreement, and the assignment to the surety was effective under the doctrine of the *Barnett* case (*supra*), at least by November 22nd, if not as of the date of the indemnity agreement (September 14th, 1940).

The Court below misconceived the effect of the assignment to the surety, stating, at the conclusion of its opinion, that it would give no heed to the alleged rights of the surety, inasmuch as the Trustee in bankruptcy had no authority to bring an action to establish a superior title in some other person. This evaded the very purpose of the petitioner in urging the assignment to the surety. Our evident purpose was to show that the surety was a creditor, and that under Section 60-a of the Bankruptcy Act could have intervened and demanded the moneys at all times and even have traced the fund directly into the hands of the Bank, unless its rights had been cut off when the Bank complied with the Assignment of Claims Act. Certainly therefore the surety was a creditor within the meaning of Section 60-a of the

Bankruptcy Act. As a matter of fact, the very Assignment of Claims Act provided that notice must be given to the surety, for it was the evident purpose of the Act to prevent secret assignments against the interest of sureties. Had the surety known of the assignment prior to the actual receipt of the moneys by the Bank, it needs little argument to realize that the surety would have caused a petition in bankruptcy to have been immediately filed, in order to prevent the unlawful diversion of $150,000. Under Section 60-a of the Bankruptcy Act the Trustee has the right to assume the position of every conceivable creditor including the surety whose rights for the purposes of this action become those of the Trustee.

POINT V.

The assignment in question, involving a contract and warrant of the United States, Federal Law and not State Law, is applicable.

It is difficult to understand whether the Court of Appeals applied the standards of State or Federal law. In *Corn Exchange National Bank & Trust Co. v. Klauder (supra)*, this Court construed an assignment of moneys purportedly made in accordance with Pennsylvania statutes. In determining the effect of lack of notice of the assignment under the Pennsylvania statutes, this Court held that the standards which applicable State law would enforce against a purchaser for value must be applied. Seizing upon that phrase, the Court of Appeals applied the State law test to the assignment of Federal moneys at bar, stating (292 N. Y. 347 at 358):

> "The 'standards which applicable State law would enforce against a purchaser for value' or against a creditor must be applied here. (Corn Exchange National Bank & Trust Co. v. Klauder, 318 U. S. 434.)"

The Court was in error. It should have applied the tests of Federal law, inasmuch as both a Federal statute and Federal moneys were involved.

Clearfield Trust Co. v. *United States*, 318 U. S. 363.

It would be an entirely different matter if Federal statutes did not require filing, and if Federal funds were not directly involved and their disbursement regulated by Federal statute.

The effect of the holding of the Court of Appeals would make the Assignment of Claims Act dependent upon the law of each state. Thus, an assignment of federal funds made pursuant to Federal statute, might be invalid in one state and valid in another. That the Court of Appeals could have come to this result is all the more inexplicable in view of its holding in *Manhattan Commercial Co.* v. *Paul*, 216 N. Y. 481. In that case the Court of Appeals had occasion to consider a purported assignment of a claim against the United States and the rights arising therefrom prior to the Assignment of Claims Act. The Court held that the assignment failed to conform to the requirements of the Statute and not only declared the assignment void by reason of the Federal Statute, but because of the opinion of this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345, the Court of Appeals stating at page 485:

> "We accept such decision* as an authority, and, controlled by it, hold that the present assignment or transfer or authorization was likewise absolutely null and void as between the plaintiff, Vermilye & Power and the defendant and did not vest in the plaintiff any right whatsoever, legal or equitable, to the moneys paid by United States on the claims to Vermilye & Power.

* Referring to the decision of this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345.

> The language of the statute and of the opinion in the National Bank of Commerce case interdicts further discussion."

It is noteworthy that the Court of Appeals completely ignored its own decision in *Manhattan Commercial Co. v. Paul*, 216 N. Y. 481, although its attention was specifically called to it.

POINT VI.

The Court of Appeals committed reversible error in disregarding the book entries of the Bank under date of November 28th.

Irrespective of the effective date of the assignment it is our contention that the actual preference took place on November 28th. It is conceded that on November 27th the Bankrupt received in Boston the Government check payable to its order for $155,865.50, and late that evening mailed it to the respondent bank *for deposit in the Bankrupt's account. It is undisputed that on November 28th the Bank actually deposited this check for $155,865.50 in the Bankrupt's account,* and that on the same day it accepted the check of the Bankrupt drawn to the order of the respondent bank in the sum of $150,000, and on November 28th withdrew that amount from the Bankrupt's account and cancelled four promissory notes of the Bankrupt totalling $150,000.

The Court below, however, determined that these transactions were to be disregarded.* Thus, instead of adhering

* The opinion makes this impossible justification for the court's holding:

> "The book entries of the bank on November 28th by which the check received by the contractor from the government was deposited in the account of the contract and the check of the contractor to the order of the bank in payment of indebtedness to the bank, merely constituted a record of the transaction in compliance with the directions of the contractor" (R. 77).

to the record, the Court invoked the fiction that when the bankrupt actually received the check on November 27th, it held the same on behalf of the Bank by reason of the assignment and thus completely disregarded that which was actually done. *In re National Lumber Co.*, 212 Fed. 928, at page 929, is most pertinent:

> "The parties chose to pay and to accept the money in the ordinary course of events, and their conduct is to be judged by what they did, not by what they might have done. Bank v. Campbell, 81 U. S. (14 Wall.) 87, 20 L. Ed. 832."

If the respondent had acted on the assignment, and regarded the Government check as its property, it would not have deposited the Government check to the bankrupt's credit and account, and then gone through the additional step of having the bankrupt make out a check for $150,000 to the respondent's order so that the respondent might cancel $150,000 of the outstanding notes of the bankrupt; $100,000 of which were payable on demand, and $50,000 not due until December 9th. The moment the Government check was deposited in the bankrupt's account, the money belonged to the bankrupt—a debtor and creditor relationship had already arisen. No matter what previous claim the Bank might have had to the Government check, it had relinquished it. Certainly it did not act on any claim of title. On November 28th the proceeds of the Government check were in the bankrupt's name, and it was obviously necessary for the Bankrupt to take some affirmative step to transfer the $150,000 to respondent.

If what the respondent contends were actually in the contemplation of the respondent, it never would have deposited the Government's check in the Bankrupt's account. The fact is that the Bank knew on November 22nd, the date it received the assignment, that it could not become effective

until the Bank obtained the consent of the Secretary of War and gave the requisite notice.

The deposit of the check in the Bankrupt's account and the payment on November 28th fixes November 28th as the date of the preferential payment, and the Respondent can trace no legal right to the funds by reason of the assignment until Respondent complied with the Assignment of Claims Act as to filing and notice. Since that date is concededly within the four month period of the bankruptcy petition, the transfer is subject to attack by the Trustee in Bankruptcy.

CONCLUSION.

The judgment of the Court of Appeals of the State of New York should be reversed and respondent's motion to dismiss the complaint denied.

Respectfully submitted,

DAVID MORGULAS,
Counsel for Petitioner.

M. CARL LEVINE,
ALBERT FOREMAN,
Of Counsel.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys,
Office & Post Office Address,
521 Fifth Avenue,
Borough of Manhattan,
New York, N. Y.

APPENDIX.

Statutes Involved.

R. S. 3477, Sec. 203, Title 31, U. S. C. Money and Finance.

All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim —shall be absolutely null and void, unless they are fully made—after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Amendment to Section 3477, Revised Statutes (October 9, 1940)

(Public No. 811, 76th Congress.)

(Chapter 779, 3d Session.)

(H. R. 10464.)

An Act.

To assist in the National-Defense Program by Amending Sections 3477 and 3737 of the Revised Statutes to Permit the Assignment of Claims Under Public Contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Sections 3477 and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due

from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: PROVIDED,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

"3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with

"(a) the General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

Sec. 2. This Act may be cited as the "Assignment of Claims Act of 1940".

Approved, October 9, 1940.

Section 60-a of the Bankruptcy Act as amended by the Chandler Act of June 22nd, 1938, 52 Stats. 840, 869-870; 11 U. S. C. Sec. 96-a.

§ 60. PREFERRED CREDITORS.—a. A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter X, XI, XII or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor

could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 188.

In the Matter of

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION,

Petitioner,

—*against*—

IRVING TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

DAVID MORGULAS,
Counsel for Petitioner.

M. CARL LEVINE,
ALBERT FOREMAN,
Of Counsel.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys,
Office & Post Office Address,
521 Fifth Avenue,
Borough of Manhattan,
New York, N. Y.

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IN THE

Supreme Court of the United States

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION,

Petitioner,

—against—

IRVING TRUST COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

Before proceeding to reply to the legal arguments advanced by Respondent, we beg leave to point out several important inaccuracies in the statement of facts appearing in the Respondent's brief.

I.

In an obvious effort to belittle the requirements of the Assignment of Claims Act, Respondent states at page 7 of its brief that it obtained the necessary consent as a matter of course, and that the consent was not expressly related to Respondent's assignment. The fact is to the contrary. Exhibit "J" (R. 15) is a memorandum dated December 4, 1940, addressed to the Assistant Secretary of War by the Quartermaster-General. It specifically refers to the assignment in question and recommends its approval by the Assistant Secretary of War. It appears from said exhibit that the assignment in question was attached to the Quartermaster-General's memorandum recommending approval of the assignment. It was upon that recommendation that the approval of December 5th was obtained.

II.

The statement is made that the Quartermaster-General was notified of the assignment and furnished a copy on November 27th. This is erroneous. As appears from Exhibit "F" (R. 12-13) the letter of the Quartermaster-General enclosing the assignment is only dated November 27th. It appears from Exhibit "G" (R. 13) that it was only forwarded on November 27th, and could not conceivably have reached the Quartermaster-General before November 28th.

Until respondent filed the assignment and notified the surety of the assignment it was a secret transfer within the meaning of Section 60a of the Bankruptcy Act.

Fully conscious of the following excerpt from the opinion of this Court in *Corn Exchange National Bank & Trust Co. v. Klauder*, 318 U. S. 434, at 438-9, viz.:

> "The Committee of the House of Representatives which reported §60(a) as quoted above was fully aware of the vicissitudes of its predecessors. These are recited in detail elsewhere, and need not be repeated here beyond a general statement that for thirty-five years Congress has consistently reached out to strike down secret transfers, and the courts have with equal consistency found its efforts faulty or insufficient to that end. Against such a background §60(a) was drawn and reported to Congress with this explanation of its purpose and effect: 'The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. * * * *'"

respondent simulates an almost naive forgetfulness of those provisions of the Assignment of Claims Act that require notice of the assignment to the main potential and actual

creditor—the Surety Company. Respondent concerns itself almost solely with the provisions of the Assignment of Claims Act that deal with filing and consent of the Secretary of War.

It is obvious that the requirement of notice to the surety was placed in the Act in order to make the surety aware of the financial condition of the contractor. For years sureties have written bonds on public constructions, and their legal position as the largest creditor in the event of trouble was well established. While it may well be that the rights of the surety were in no manner changed by the Assignment of Claims Act, Congress, nevertheless, saw fit to require notice to the surety as a prerequisite of any assignment. As the Respondent itself points out (p. 28 Resp. Brief) the sureties at first sought a veto power over any assignment. The requirement of notice was evidently a compromise. The requirement of notice was neither mere verbiage nor accidental, but a vital requirement, in view of the over-all interest of the surety in the performance of the Government contract, and the availability of the Government funds for its completion. It is this essential element that the Respondent completely ignores and neglects in its consideration of both the validity of the assignment and its effectiveness within the meaning of Section 60a of the Bankruptcy Act.

Whatever were the judicial attempts to liberalize the rigors of Section 3477 of the Revised Statutes prior to the amendment of October 9, 1940, Congress made no change in the body of the statute, which clearly stated that the assignment was absolutely null and void. Congress merely appended a rider which stated the express conditions under which the restrictions and penalties attaching to assignments might be lifted.

If the assignment was void before October 9, 1940, certainly it gains no greater validity by reason of the failure to comply with the very requirements which the statute

enumerate to take it out of the realm of nullity. Respondent also blinds itself to the very language of the section when it states that there is nothing in the statute to encourage the notion that the assignment was wholly inoperative pending compliance or any penalty for failure to comply. Nothing, we say, but the very language of the statute, which says the assignment is absolutely null and void, unless, amongst other things, filing was accomplished and notice to the surety given.

The authorities mentioned under Point I of Respondent's brief all deal with situations where assignments may be freely made without the requirements of filing or notice to creditors or where no bankruptcy doctrine was involved as *Pickering* v. *Lomax*, 145 U. S. 310. Thus, *Rockmore* v. *Lehman*, 129 Fed. (2d) 892 (cert. denied 317 U. S. 700) involved assignments of business contracts, and the question before the Court was simply whether the date of the assignment of the contract was the date to be fixed for the running of the four-month period, or whether the date the assignee received the moneys under the assigned contract was the proper date. The Court came to the conclusion that inasmuch as the assignment of the contract was effective as of its date, it mattered not when the moneys were received by the assignee. The decision was predicated wholly upon New York statutes, where no filing or notice to anyone was necessary. The mere citation of that authority, in view of the Federal statute first prohibiting assignments and then qualifying their validity under certain conditions, but shows the confusion with which Respondent approaches the legal matters under consideration.

Respondent argues that secrecy does not preclude perfection of a transfer otherwise permissible. Nobody disputes that, but where a statute not only demands filing, but notice to the largest potential creditor, secrecy in itself precludes

the perfection of the transfer within the meaning of Section 60a, because that was the very circumstance at which Section 60a was directed.

Respondent's argument that the purpose of the Assignment of Claims Act can best be served if lending institutions can rely on it is a misdirected one. All that lending institutions need do is to comply with the Act and then they may rely on it without question. It is idle to urge, as Respondent does, that the four or five days which may be needed to obtain consent and give the requisite notices in any way constitutes a hardship or a deterrent to institutions making loans. It is only in instances of the present kind, where institutions seek these assignments to secretly bail themselves out of precarious positions, that speed becomes so urgent, but that is the very thing which Section 60a is directed against. If any contractor is so strapped for funds that he cannot make his arrangements sufficiently in advance to await financing until four or five days elapse, then, we say, he deserves no financing.

Certainly banks know that sureties are the real parties in interest. If they choose to advance monies without notice to the very party that is responsible to the Government for completion, when the statute requires such notice, banks should suffer the consequences. No bank is under any obligation to loan monies with or without the collateral assignment. In fact the loans in the instant case were made before the assignment was even executed. Respondent obtained the assignment not to finance, but to grab the money and then close down on the bankrupt. That is most evident from the Respondent's own office memoranda (R. 33, 37).

The mailing of the check did not pass title to Respondent.

Respondent cites a number of cases at pages 36 to 41 of its brief to the effect that the mailing of the Government check on November 27th constituted delivery and transfer of title thereto to the bank. Here, again, Respondent entirely overlooks the fact that the check was mailed for deposit only. The authorities cited by Respondent merely concern themselves with delivery where there was an intention to pass title to an endorsee or assignee. What is required to pass title to a check where there is an intention to pass title is wholly irrelevant to the question as to whether a bank acquires title to a check where it is transmitted for the purposes of deposit only.

Thus, in one of the cases cited by respondent, *Chapman* v. *Mills & Gibbs*, 241 Fed. 715, the check was endorsed to the order of the bank and *not mailed for deposit* as it was in the case at bar.

Respondent completely overlooks the fact that the mailing by a depositor of a check for deposit passes no title to the check, and that it is but a limited endorsement.

Section 35 of the New York Negotiable Instruments Law specifically states that:

> "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument."

Section 350-c of the Negotiable Instruments Law distinctly provides as follows:

> "An indorsement of an item by the payee or other depositor "for deposit" shall be deemed a restrictive indorsement and indicate that the indorsee bank is an agent for collection and not owner of the item."

The Court of Appeals in *Noma* v. *Handrulis*, 277 N. Y. 223, stated at pages 231, 232:

> "The indorsement by the payee 'for deposit' was not an indorsement in blank. The check was not thereby negotiable in the hands of any person to whom it might come (2 Bouvier's Law Dictionary (Rawle's Third Revision, 8th ed.), p. 1545). It was not payable to bearer, could not be negotiated by delivery, and no title was transferred to any one. It still remained, at least until it was paid, the property of the plaintiff (Bank of Clarke County v. Gilman, 81 Hun, 486; affd., 152 N. Y. 634). The indorsement was restrictive and prohibited further negotiation for any purpose except for collection for deposit in her account."

It is significant that the Court of Appeals in its opinion did not base its decision on the respondent's present argument that title to the Government check passed on mailing. The Court of Appeals could not have conceivably made any such ruling in view of the foregoing statutory restrictions and authority.

What the Court did say was (R. 77):

> "Certainly when the contractor received payment by check from the government on November 27th it was in good faith bound to deliver the check or its proceeds

to the defendant in accordance with its agreement as evidenced by the executed assignment" (R. 77).

That alleged duty is the very question at issue.

The Court of Appeals predicated the duty on the assignment. It is the validity of that very assignment that is in issue. Therefore respondent's discourse on the rights obtained by the mere mailing of the check and the alleged passage of title not only formed no basis of the opinion of the Court of Appeals but is entirely irrelevant.

The New York law as to the rights of successive assignees does not govern the disposition of this case.

A large part of Respondent's brief concerns itself with the argument that the law of New York is to the effect that where there are two successive assignments, the first has priority.

We have, of course, pointed out in our main brief that New York law is inapplicable where we deal with Government funds regulated by Federal Statute. The fact that the Court of Appeals of the State of New York itself recognized that principle in the case of *Manhattan Commercial Co.* v. *Paul*, 216 N. Y. 481, is entirely ignored by Respondent.

It may also be well to point out in this connection that the Personal Property Law of the State of New York requires the application of the Federal Act. Section 41 of the Personal Property Law of the State of New York provides as follows:

"Sec. 41. Transfer of Claims.

1. Any claim or demand can be transferred, except in one of the following cases:

* * * * *

(3) Where a transfer thereof is expressly forbidden by a statute of the state, or of the United States, or would contravene public policy."

Respondent's error becomes more apparent when we consider that even in New York State, where moneys on a public construction are involved, the rights of an assignee are governed by the Lien Law, and not by the General Law pertaining to simple assignments. *Lee* v. *Bailey*, 267 N. Y. 161.

It would be an entirely different matter if Federal statutes did not require filing, and if Federal funds were not directly involved and their disbursement regulated by Federal statute. Even where both Federal and State statutes provide for filing or recording, the Federal statute will govern and supersede the State requirement where it particularly affects something over which the Federal Law has jurisdiction.

In the Matter of National Fish Co.; 6 Am. Bank. Reports (N. S.) 454.

In this connection, Respondent's comment on *Judson* v. *Corcoran*, 58 U. S. (17 Howard) 612, is characteristic. In that case this Court held that a second assignee of funds in the hands of the Government, and who notified the proper authorities of the assignment and obtained an award after a hearing, had a right to the fund as against a first assignee who failed to give notice, where notice was permissive only. Respondent now, with every appearance of indignation, suggests that it is irrelevant to the realities of this case as to how the Respondent might fare in a contest with a subsequent assignee in possession of the subject matter of the assignment. Yet the Respondent concedes (p. 14 of its brief) that one important aspect on which the effectiveness of its assignment depends is, "Was the assignment operative as against a subsequent assignee."

The Respondent Has No Right of Set-off.

In spite of the fact that the instant motion was made on the sole ground that the transfer complained of was without the four month period and in spite of the fact that respondent itself admits at pages 9 to 10 of its brief that the aforesaid was the sole ground of the motion, the respondent now urges that it was entitled to the Government check by way of set-off.

The principles applicable to the right of set-off have been so clearly enunciated by the Courts that it is inconceivable how, under the present circumstances, respondent could have even suggested that right. It is well established that a set-off can only be invoked where there was no prior thought of applying the deposit to repayment of the loan. It is clear from all the affidavits, and, as a matter of fact, the bank urges throughout its brief that the deposit of the Government check, as well as the bankrupt's check, to the order of the respondent for $150,000, was made with the express intent of wiping out the indebtedness of the bankrupt to the respondent bank.

We need go no further than the bank's own memorandum of November 28th, wherein the decision was arrived at that upon receipt of the check the bank's indebtedness should be repaid and no further advance made (R. 33).

The rule is clearly stated in *Goldstein v. Franklin Square National Bank* (C. C. A. 2d Cir.), 107 F. (2d) 393, wherein the Court said at page 394:

> "The cause of action alleged against the bank was that deposits made by the bankrupt between December 15th and December 27th, although made in his checking account, were intended to be used and were in fact used to pay off an antecedent debt of $1,000 owed by the bankrupt to the bank, this at a time when the bankrupt was insolvent, within four months of bankruptcy, and

when the bank had knowledge or reasonable cause to believe that payment of the debt would give it a preference over other creditors. If these allegations were true, the deposits were voidable preferences under section 60 of the Bankruptcy Act. Deposits accepted by a bank with intent to apply them on a pre-existing claim against the depositor rather than to hold them subject to the depositor's checks in ordinary course are given their intended effect when so applied, that is to say, they are payments on account of the debt; and if they were made when the depositor was insolvent and within four months of bankruptcy, with knowledge or reasonable cause to believe on the bank's part that the depositor was insolvent, they are recoverable by a trustee in bankruptcy as voidable preferences. (Citing cases.)"

There is another compelling reason why the right of set-off does not exist in this case. It has been repeatedly held that where a bank knows that the deposits are, in fact, trust funds, no set-off can exist. There is no question in this case but that the respondent had full and complete knowledge of the rights of the surety company. Its own memoranda indicate that they regarded their rights as inferior to the surety, unless the surety subordinated (R. 36).

In *Raymond Concrete Pile* v. *Federation Bank*, 288 N. Y. 452, the Court held that if there is evidence that the bank knew or had reasonable grounds to know that subcontractors were unpaid the bank was in duty bound to regard the deposit as a trust fund. That the respondent knew subcontractors were unpaid was never questioned. The same trust principle is applicable to the receipt of moneys under a Federal contract.

California Bank v. *U. S. F. & G.*, 129 F. (2d) 751; *Maryland Casualty* v. *Lincoln Bank*, 40 Fed. Supp. 472.

In the case at bar, it was the deposit of the Government check of $155,865.50 and the drawing of the bankrupt's check for $150,000. that created the simultaneous transaction resulting in the preference. There was never any thought of set-off.

In this connection, we wish to answer the respondent's argument that in adhering to the bank's records we are putting form above substance. That claim of the bank, although completely unfounded, is nothing new. It has been repeatedly raised by banking institutions, especially where they subsequently claim that they had the right to do by way of set-off what they did not have a right to do by reason of the transaction as it actually occurred. In answering a similar contention, this Court said in *Trader's Bank* v. *Campbell*, 81 U. S. 87 at 97:

> "They now claim that this was what they had a right to do and that it should remain a valid set-off. But this does not appear to have been really what was done."

Again, *In re National Lumber Co.* (C. C. A. 3d Cir.), 212 Fed. 928, the Court had special occasion to answer a similar argument, stating at page 929:

> "If the company had allowed the money to remain in its account until after bankruptcy had supervened, a situation would have been presented to which the clause (Sec. 68a) might have applied. But this was not done. The money was actually drawn out by the company—for this was the effect of its check—and was actually handed over to the bank in payment of the note, so that we do not have a case of mutual accounts

where one may be set off against the other, but the case of the use of money to pay a debt under circumstances that made the payment preferential. The argument really comes to this: If the payment had not been made, the bank could have set off the deposit against the note, and the result would then have been just what it is now. The sufficient answer is—the contingency did not happen. The parties chose to pay and to accept the money in the ordinary course of events, and their conduct is to be judged by what they did, not by what they might have done. Bank v. Campbell, 81 U. S. (14 Wall.) 87, 20 L. Ed. 832."

The Surety was a creditor within the meaning of Section 60a of the Bankruptcy Act whose rights enured to the Trustee in Bankruptcy.

At page 44 of respondent's brief, it urges that the authority of the trustee is not enlarged by reason of the fact that the bankruptcy is the individual venture of the surety company. We make no such claim. On the contrary, we urge the creditor and other status of the surety for two reasons:

(1) The surety being a potential creditor who could have intervened on November 27th and prevented the transfer of the Government funds to the bank, the trustee may assert that status in his own behalf.

(2) If the bank rests its claim to the Government check on the assignment *per se*, then it must fail because the surety company had a prior assignment which entitled it to the check both at law and in equity.

We had endeavored to avoid any discussion as to the motive of the surety's action in the bankruptcy proceedings

and hoped that the argument would be limited to the applicable legal principles. Respondent, however, ever mindful of the delicacy of its position as evidenced by its office memoranda now casts aspersions on the action of the surety in precipitating the bankruptcy proceedings and instigating this action. For that the surety has no apologies. After the bankrupt's contracts with the United States were completed, its financial affairs were in such a muddle that bankruptcy was the only alternative. Not only were large sums due from the government, but other funds and equipment were available which were being dissipated by the bankrupt. The proposed action against the respondent was but one motivating factor and far from the sole reason for bankruptcy. Whether the surety will be a general creditor or whether it will be able to impress a trust on the avails of the preference suit is foreign to this appeal. On that issue there is and will be considerable difference of opinion.

The respondent likewise realizing that the defaults did exist on November 27th and that the surety could have enforced its rights, now argues that the surety did nothing about it then as a reason for defeating this action. What would the respondent have the surety do at the time? The surety was indeed in a most awkward and embarrassing position. The bank had been fully paid. The surety company faced a host of unpaid creditors and an incompleted contract. The War Department was clamoring for its buildings.

The surety company certainly had nothing whatsoever to gain by precipitating bankruptcy at that stage. It was common sense to make the best of the condition at the time, finish and turn over the completed contract to the Government, pay the obligations to the creditors, and then determine the question of the bank's right to the $150,000 payment. If the bank were right, it lost nothing. In fact it

had continued to lend the Contractor large sums of money at profitable rates of interest on the best security existing—moneys due from the Government. Certainly there is nothing that can be the subject of criticism in the surety attempting to right a wrong after the Government was fully satisfied, and there was nothing left but to determine the legal rights of all concerned.

Respondent would also have this Court believe that the surety company at no time made any effort to protest the assignment, and voluntarily and without suggestion on the part of the bank executed the letter of December 6th (R. 37-38). Nothing could be further from the fact. Protest it did, for that is evident by the very letter of December 6th. The Bank had already obtained the $155,865.50 and threatened, according to its own memoranda, to cease financing. Knowing full well of the surety company's rights, it took great pains to demand the letter of December 6th before advancing any further funds, for it feared the surety, even though the assignment was then filed. The fact that the job went sour by over $300,000 is eloquent testimony to the benefits the bank derived by its skillful maneuvers, for it was the surety company that sustained the entire loss. Yet, the Bank now has the temerity to suggest that the surety was guilty of some improper conduct in causing a petition in bankruptcy to be filed. It would have this Court believe the ridiculous yarn that the surety in some manner deceived the Bank into making continued loans, only to strike surreptitiously through the trustee in bankruptcy.

As we see it, the respondent acted on the theory that possession was nine-tenths of the law, and that it was good business policy to grab all the money it could and risk later litigation. It should not now attempt to conceal that obvious course of conduct by casting aspersions on the

motives of those who attempt to undo its alleged illegal action.

Respectfully submitted,

DAVID MORGULAS,
Counsel for Petitioner.

M. CARL LEVINE,
ALBERT FOREMAN,
Of Counsel.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys,
Office & Post Office Address,
521 Fifth Avenue,
Borough of Manhattan,
New York, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 188.

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION,

Petitioner,

vs.

IRVING TRUST COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE IRVING TRUST COMPANY IN OPPOSITION.

WILLIAM A. ONDERDONK,
Attorney for Respondent,
One Wall Street,
New York City.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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BRIEF FOR THE IRVING TRUST COMPANY IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals of the State of New York is reported in 292 N. Y. 347, and is set forth in full at pages 96 to 105, inclusive, of the record.

Jurisdiction.

The jurisdiction of this court is invoked under section 237 (b) of the Judicial Code, 28 U. S. C. A. 344 (b).

The Question Presented.

By the first of two causes of action set forth in the complaint (R. 35) petitioner seeks to set aside as preferential within section 60a of the Bankruptcy Act the transfer of

$150,000 made by Graves-Quinn Corporation (hereinafter referred to as "Graves-Quinn") to respondent. One of the issues raised by the pleadings is whether the transfer occurred within or without the statutory four months. Upon facts that are not disputed respondent moved for judgment dismissing this cause of action on the ground that the transfer occurred more than four months before the filing of the petition in bankruptcy.

Both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeals held that the transfer was outside the four months' period. Accordingly, the first count of the complaint was dismissed.

The ultimate question is whether the transfer was so far perfected outside the four months' period that no purchaser from the bankrupt and no creditor could thereafter acquire any rights in the property transferred superior to those of respondent.

Statutes Involved.

Title 31 U. S. C. A., section 203, as amended by Assignment of Claims Act of 1940.

Section 60a of the Bankruptcy Act, as amended by the Chandler Act of 1938.

These statutes are printed at pages 11 to 13, inclusive, of the petition.

Statement.

In September 1940 Graves-Quinn entered into a contract with the War Department for the construction of military housing at various points in New England for the stated consideration of $1,008,800. Graves-Quinn applied for and received necessary financing from respondent. The

first loan was made on October 10, 1940, in the amount of $30,000. Thereafter, and throughout the life of the contract, additional loans in varying amounts were made (R. 12). According to the agreement (R. 10, 98) outstanding loans were retired from time to time as Graves-Quinn received payments on the contract.

As the work progressed Graves-Quinn required more assistance than was at first anticipated. It was because of the greater need that respondent obtained on November 22, 1940 as security an assignment of the moneys due and to become due on the contract (R. 67).

The filing prescribed by the Assignment of Claims Act of 1940 was completed on December 3. The consent of the Secretary of War was obtained on December 5. Thereafter payments on the contract were made by the government direct to respondent (R. 10).

In the meantime, and on November 27, 1940 Graves-Quinn received on account of its performance of the contract a check from the government for $155,865.50 (R. 8). On the same day Graves-Quinn mailed this check from Boston to respondent in New York along with its own check for $150,000 drawn to the order of respondent (R. 9). These checks were physically received by respondent on November 28 (R. 9). At the time of their receipt the deposit account of Graves-Quinn was overdrawn and respondent held four notes of Graves-Quinn aggregating $150,000 (R. 7, 76). These notes were retired on November 28 out of the government payment covered by the assignment (R. 10). Exactly four months later, and on March 28, 1941, which was some weeks after the contract had been fully performed by Graves-Quinn, the petition in bankruptcy was filed (R. 35).

Petitioner maintains that payment on November 28 fixes the time of the transfer. Respondent maintains that the

time of the transfer is fixed by the consummation on November 27, if not before, of its security right in the fund from which the payment was made.

The Court of Appeals decided the issue on the facts present in the case relevant to the issue.

Petitioner has been persistently unwilling that the issue be resolved on the relevant facts. Even before this court petitioner continues his misuse of irrelevant facts.

Such is his undertaking to impugn the motives of respondent. The charge made would be frivolous if true. It is false. The Appellate Division only reflected the record when it stated that respondent took the assignment in good faith (R. 92).

Of like quality is petitioner's contention about the relevant rights of surety and bank. He purports still not to apprehend that if the surety is entitled to the money received by the bank, the trustee is not entitled to it. Judge Lehman disposed of the contention in these words (R. 105):

> "The action is brought solely to set aside the transfer to the bank as an unlawful preference. The trustee in bankruptcy has no authority to bring an action to establish a superior title in some other person."

Argument.

The Appellate Division and the Court of Appeals were in unanimous agreement that the transfer occurred outside the four months' period.

The Appellate Division held that as against the trustee respondent was entitled to the moneys received out of the government payment because no purchaser from Graves-Quinn and no creditor could acquire a right superior to that of the bank after delivery of the instrument of assign-

ment on November 22, regardless of the time of the filing and consent.

The Court of Appeals chose to place its affirmance on the broader base available because of the facts peculiar to the case. In order to find that the bank acquired a special property in the government payment it was not necessary to hold that the assignment was operative as against a subsequent assignee before the filing and consent. There was no such assignee and down to the close of November 27 petitioner is concluded by the facts.

What in essence the Court of Appeals decided was that because prior to November 28 and outside the four months' period (1) the bank had the instrument of assignment; (2) Graves-Quinn had the government check for $155,865.50, with the duty by virtue of the assignment to turn it over to the bank; and (3) Graves-Quinn on November 27 delivered the check to the bank by depositing it in the mails addressed to the bank, no purchaser from Graves-Quinn and no creditor could acquire a right to the check superior to that of the bank within the four months' period.

Petitioner is no more baffled by an unanswerable judicial declaration such as that of the Court of Appeals than he is by an adverse fact.

Of the holding that Graves-Quinn was bound to deliver the government check to the bank, petitioner says (Br. 22):

> "In so holding the Court of Appeals entirely misconceived the purport of section 60a of the Bankruptcy Act, for under that section the trustee could have intervened on November 27th and prevented the payment."

The misconception is on the part of petitioner. The transfer was perfected on November 27, if not before. The trustee must accept the facts of November 27 as they were.

The authority of the trustee to assail a transfer in the right of the phantom creditor of Section 60a dates only from November 28. That is too late.

The Court of Appeals took note of the four months' limitation on the availability to the trustee of the statutory fictions. Petitioner talks as if the limitation did not exist.

To urge as petitioner does (Point V) that federal law is applicable as if there were a conflict on which the case turns is pointless. The Court of Appeals, as the opinion shows, closely examined section 60a of the Bankruptcy Act and the Assignment of Claims Act of 1940.

What state law has been followed to the exclusion of applicable federal law is not obvious. It was this court which held in *Martin* v. *National Surety Company*, 300 U. S. 588, decided before the Assignment of Claims Act of 1940, that an assignment void on its face under section 203, title 31 U. S. C. A. might be given effect after payment made by the government. Certainly respondent as a beneficiary of the Assignment of Claims Act of 1940 is not less well off with the statute than it would be without it.

Petitioner is twice wrong respecting the doctrine of relation back. He is mistaken in thinking that the doctrine is destroyed by section 60a as it now reads. He is also mistaken in thinking that respondent is dependent on the doctrine.

The courts of New York did not overlook, and we do not overlook the full significance of the 1938 amendment of section 60a. By the new definition of the time when a transfer is deemed to be made, some transactions are brought within the time range of section 60a, and therefore open to attack, that were before safe from attack.

A case such as *Goldstein* v. *Rusch*, 56 F. (2d) 10, brought by a trustee to set aside a pledge of tangible property,

would not be decided the same today. It made no difference before 1938 that a pledge made outside the four months' period was completed by change of possession of the thing pledged inside the four months' period. It makes a difference now. It is the reason for the difference which petitioner misapprehends.

There has always been an infirmity in the pledge of a chattel so long as the pledgee did not reduce the chattel to possession. So long as change of possession is deferred it is now, and always has been, possible for a subsequent assignee to acquire a superior right. That is a limitation on the doctrine of relation back that is as old as the doctrine itself. The present section 60a takes advantage of this limitation, with the result that the four months' bar is of no avail to the pledgee unless his rights as against a subsequent pledgee have been perfected prior to the start of the four months' period.

Corn Exchange National Bank v. *Klauder*, 318 U. S. 434, did not "specifically", as petitioner says (Point III), or otherwise repudiate the doctrine of relation back. What it did was to give effect to the qualification that is part and parcel of the doctrine, as required by section 60a.

Petitioner misses the real significance of the *Klauder* case, which is that the rights of successive assignees are not to be determined by section 60a. That is left to other law, now as heretofore.

The *Klauder* case turned on the time when the assignee of accounts receivable so perfected its right as to be secure against the claim of a subsequent assignee. The issue was decided by the law of Pennsylvania. By that law the assignee of an account who first gave notice to the debtor had first right. The assignment, therefore, was only perfected when the assignee notified the debtor.

In *Rockmore* v. *Lehman*, 129 F. (2d) 892 (cert. den. January 18, 1943, 87 L. Ed. 403) a result contrary to that in the *Klauder* case is accounted for by the fact that by the law of New York, which controlled, notice to the debtor is not necessary to perfect the right of an assignee of an account receivable as against a subsequent assignee. That being so, the assignment was perfected with the delivery of the instrument of assignment.

Since *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the federal courts have had no independent law on the subject. Prior to that decision, and at least after the decision in *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182, the federal rule was the same as that of the State of New York and of numerous other states.

There is no applicable law, federal or state, of which we have been apprised, which would give to a purchaser from Graves-Quinn subsequent to November 22, 1940 any right in the moneys assigned, whether the purchase was made before or after filing by respondent was completed and the consent obtained. If there is such law, it does not save petitioner. As to the government payment on November 27, and that is the extent of our present interest, no purchaser could come between the bank and the money assigned within the four months' period. That is the test of section 60a and by it petitioner is precluded. The doctrine of relation back might be as dead as petitioner says it is and he would not be helped.

Petitioner in his Point VI urges that form should prevail over substance. The facts as of November 27 and earlier control and not the routine by which payment was effected on November 28. Defendant had a special property in the fund out of which the debt was paid which was not lost in the very process employed to cancel the debt.

Conclusion.

There is no adequate reason, if indeed there is any reason at all, for a review by this court. There is no question of general importance. The decision of the Court of Appeals turns upon the facts of this case, and the facts are such that no arguable construction of either section 60a of the Bankruptcy Act or the Assignment of Claims Act of 1940 is involved. All that the Court of Appeals needed to do to find that the trustee was barred by the statutory limitation, and what it did, was to invoke recognized principles of law governing the transfer of property rights. Every contention of petitioner that the Court of Appeals acted in disregard of the federal statutes is predicated on a false premise. The petition should, therefore, be denied.

Respectfully submitted,

William A. Onderdonk,
Attorney for Respondent,
One Wall Street,
New York City.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1944.

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against

IRVING TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

WILLIAM A. ONDERDONK,
Attorney for Respondent.

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Appellate Division is reported in 266 App. Div. 599, and the opinion of the Court of Appeals in 292 N. Y. 347. The opinion of Special Term is not officially reported.

Jurisdiction.

Certiorari was granted October 9, 1944 on a petition filed June 23, 1944. Jurisdiction of the court is invoked under section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b).

Question Presented.

Whether payment of a debt of $150,000 on November 28, 1940, exactly four months prior to the filing of a petition in

bankruptcy against the debtor on March 28, 1941 constituted a transfer within the four months' limitation of section 60a of the Bankruptcy Act when (1) the debt was paid from a payment received by the debtor on November 27, 1940 for work performed by the debtor for the United States pursuant to a subsisting contract; (2) the government payment was mailed to respondent on November 27, 1940; and (3) the government payment was included in moneys assigned to defendant by an instrument of assignment duly executed by the debtor and delivered to respondent on November 22, 1940.

Statutes Involved.

We reproduce here the text of the statutes as far as material:

R. S. 3477, §203, Title 31 U. S. C. A.:

> All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim * * * shall be absolutely null and void, unless they are freely made * * * after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Amendment to Section 3477, Revised Statutes

(October 9, 1940)

(Public, No. 811, 76th Congress.)

(Chapter 779, 3d Session.)

(H. R. 10464.)

An Act.

To assist in the National Defense Program by Amending Sections 3477 and 3737 of the Revised

Statutes to Permit the Assignment of Claims Under Public Contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 3477 and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: PROVIDED,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

"3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with

"(a) the General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment:

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

Sec. 2. This Act may be cited as the "Assignment of Claims Act of 1940."

Approved, October 9, 1940.

Section 1(30) of the Bankruptcy Act:

Meaning of Words and Phrases

Sec. 1.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * * * * *

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or

involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise.

Section 60a of the Bankruptcy Act:

Preferred Creditors

Sec. 60a.—A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter X, XI, XII or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.

Section 191 Uniform Negotiable Instruments Act:

§191. Definitions

* * * * * *

"Delivery" means transfer of possession, actual or constructive, from one person to another.

Statement.

The Facts.—Graves-Quinn Corporation (hereinafter called Graves-Quinn) was organized under the laws of

the State of New York, with its principal office in New York City (R. 9).

On September 14, 1940 Graves-Quinn entered into a contract with the United States for the construction of military housing in Boston and elsewhere in New England, at a stated consideration of $1,008,800 (Ex. B, R. 9).

The required payment and performance bonds were written by the Standard Accident Insurance Company (R. 48).

Graves-Quinn needed help to finance its operations under the contract (R. 4, 36, 44). It came to respondent, with which it had banked for many years, for the help required (R. 4).

Beginning October 10, 1940 respondent made a series of loans to Graves-Quinn. These continued over several months and until performance of the contract by Graves-Quinn was completed. All notes evidencing the advances bore interest at the rate of 4½% per annum, and all except three were payable on demand (Ex. A, R. 8).

The advances were to be repaid as Graves-Quinn received payments from the government (R. 6). The practice followed the understanding from start to finish. In conformity therewith payment of all three of the time notes was anticipated (R. 7).

As time went on Graves-Quinn sought larger advances than were at first contemplated. Because of the increased loans respondent as early as November 7 asked for an assignment of the moneys to become due from the government as security (R. 44). On November 20 the assignment was executed (Ex. B, R. 9). On November 22 the assignment was delivered to respondent (R. 5, 36, 37).

Because the Graves-Quinn contract was made prior to adoption of the Assignment of Claims Act of 1940, which became law on October 9, 1940, the assignment required the consent of the Secretary of War. This requirement was in-

tended to enable the government, if it wanted, to prevent the contents of outstanding contracts from being divulged (R. 21). The necessary secrecy was controlled in subsequent contracts by the express provision of the Act that an assignment could not be made of any claim arising under a contract forbidding such assignment (R. 41).

Respondent obtained the necessary consent as matter of course on December 5, 1940 (Ex. H, R. 14). The form of the consent shows the indifference of the War Department. The consent was not expressly related to the assignment held by respondent. It was blanket approval of any assignment within the enabling Act.

The Assignment of Claims Act required also that notice of the assignment, together with a copy of the instrument of assignment, be filed with each of several government departments and with the surety on the bonds which the assignor had posted (R. 42). Respondent fully complied with this requirement.

The Quartermaster General was notified of the assignment and furnished a copy of the assignment on November 27 (Ex. F, R. 12). A copy of the assignment with notice was mailed to the surety on December 2 (Ex. G, R. 13). On December 2 also, copies of the assignment with notices similar to that to the surety were mailed to the General Accounting Office and to the Disbursing Officer (R. 5).

By reason of the assignment the government made all payments to which Graves-Quinn became entitled under the contract throughout December 1940 and January 1941 direct to respondent (R. 7). In March, at the request of Graves-Quinn (Ex. D, R. 11), the assignment was released (Ex. E, R. 12).

After the making of the assignment but before the filing and consent the government issued and delivered to Graves-Quinn in Boston, on account of its liability on the

contract, its check for $155,865.50. This check was received by Graves-Quinn on November 27 (R. 5). On the same day Graves-Quinn mailed the check to respondent. The check was physically received by respondent in New York on November 28 (R. 5, 6).

On November 27 also, Graves-Quinn drew its check to the order of respondent for $150,000 (R. 6, Ex. K, R. 16), which was likewise physically received by respondent in New York on November 28 (R. 6).

At the opening of business on November 28, 1940 respondent had on its books three notes made by Graves-Quinn, two payable on demand aggregating $60,000, and one note for $50,000 due by its terms on December 9, 1940. At the same time Graves-Quinn was indebted to respondent by reason of overdrafts upon its checking account aggregating a little more than $40,000 (R. 4; Bank Statement, R. 40). During the course of the day, November 28, the government check was credited to the Graves-Quinn account, a demand note dated November 20 for $40,000 went on the books, virtually wiping out the overdraft, the $150,000 check drawn by Graves-Quinn was debited to its account and the four notes aggregating $150,000 were retired (Bank Statement, R. 40; Ex. A, R. 8). It is the payment of the debt of $150,000, represented by the four notes (Exhibits submitted by petitioner on argument R. 51), of which petitioner complains.

Payment of the debt in its entirety came from the government payment of $155,865.50 (R. 6).

November 28 was exactly four months before the filing of the bankruptcy petition (R. 22).

After the events of November 28, business went on as before for many weeks. On the very next day respondent made a fresh advance of $82,000 (Ex. A, R. 8).

Respondent had some doubt as to the worth of the assignment as security (R. 33). In particular it did not know but that its value might be impaired during the subsequent life of the contract by action on the part of the surety. The situation was clarified when the surety wrote its letter of December 6, 1940 (R. 37, 38).

The surety, by reason of the performance and payment bonds which it had furnished, was committed before the bank made the initial loan on October 10. It had underwritten completion of the job and payment of its labor and material costs. It was obligated to see the project through, whether Graves-Quinn stood or fell. The surety wanted Graves-Quinn to finish the job. In its own interest it wrote the letter of December 6.

While Graves-Quinn carried its contract to completion it was unable to pay all the bills. The surety had to pay those materialmen who remained unpaid after completion of the contract.

It was the surety that on March 28, 1941 caused a petition in bankruptcy to be filed against Graves-Quinn (R. 21, 43).

It is not disputed that the only purpose of the bankruptcy proceeding was to make possible the pending suit against respondent. In preparation therefor the receiver appointed by the court was replaced by the trustee selected by the surety. The attorneys for the surety became attorneys for the trustee (R. 43).

The Motion.—The motion is addressed to the first of two causes of action. In this cause of action petitioner seeks to recover the payment of $150,000 to respondent as preferential by section 60a of the Bankruptcy Act.

The pleadings raise several issues. The motion of respondent involves only one issue.

That issue is whether the transfer, which petitioner must avoid if he is to recover on the first count, did or did not occur within four months of the filing of the bankruptcy petition as required by section 60a of the Bankruptcy Act to make it preferential. Respondent singled out and urged as the ground of its motion that the transfer did not occur within the four months' period (R. 7, 20).

Stated another way, the question raised by the motion is whether the payment on November 28 or the events of a prior date constituted the transfer. Petitioner's answer is that payment of the debt was made on November 28 and that fact alone settles the issue. Respondent's answer is that while the debt was paid on November 28, underlying the payment was an antecedent transfer which is controlling.

The facts by which the time of the transfer must be determined are too well attested to be disputed. They are not disputed.

The Opposition.—In the first of two affidavits in opposition petitioner assailed the good faith of respondent. The charge was both irrelevant and untrue. When the Appellate Division observed that respondent acted in good faith in taking the assignment (R. 66) it only reflected the record.

In a second affidavit in opposition petitioner asserted a prior right in the surety to the government payment of $155,865.50 out of which the Graves-Quinn notes held by respondent were paid. This claim was predicated on an agreement made by Graves-Quinn on October 2, 1940 (Ex. A, R. 50) and long before the assignment to respondent. It has no place in this action for various reasons. One sufficient reason was stated by Judge Lehman thus:

"* * * the action is not brought by the plaintiff as trustee to establish that the surety has a title superior to the title of the bank. The action is brought solely to set aside the transfer to the bank as an unlawful preference. The trustee in bankruptcy has no authority to bring an action to establish a superior title in some other person" (R. 105, 106).

Both opposing affidavits were made by a total stranger to the events of November 1940, and what is stated in support of the surety is unsupported hearsay with the exception of the agreement of October 2 between the surety and Graves-Quinn.

The real significance of petitioner's plea in behalf of the surety is the disclosure that as far back as the time when the record was being made petitioner lost confidence in his cause of action. The alleged liability of respondent to the surety was offered as a substitute for a transfer within four months of the filing of the petition. The alternative was counted on in one devious way or another to block dismissal of the trustee's suit.

One of petitioner's major grievances in this court is that the stratégem of the surety did not work in the state courts.

SUMMARY OF ARGUMENT.

POINT I.—Respondent had an assignment of all moneys due and to become due from the government to Graves-Quinn under War Department Contract #6101 qm-131 that was perfected by the test of section 60a of the Bankruptcy Act on November 22, 1940.

The provisions of the Assignment of Claims Act of 1940 for filing and consent do not give a second assignee a

superior right by reason of being the first to obtain the statutory consent or to file. Relative rights must be determined by principles of general application and by state law.

By the law of the State of New York as between successive assignees the first assignee has priority regardless of delay in giving notice to the debtor.

POINT II.—By reason of the assignment respondent had at least a property interest in the government payment of $155,865.50 out of which the $150,000 debt of Graves-Quinn was discharged that was superior to any right that any purchaser from or creditor of Graves-Quinn might acquire within four months of the filing of the petition.

Apart from the Assignment of Claims Act of 1940 respondent had a lien on the government check in the hands of Graves-Quinn.

When Graves-Quinn endorsed and delivered the check to respondent, if not before, the transfer was perfected by the test of section 60a. As this occurred outside the four months' period it is as effective against petitioner as against Graves-Quinn.

POINT III.—As payment of the debt on November 28, 1940, was made from security, the time of the transfer was the time when the security position was perfected on or before November 27, 1940.

The rule respecting choses in action as security does not differ from the rule respecting security in other forms. It is the time when the security position is perfected, and not the time when the avails thereof are received and applied in payment of the debt that controls.

POINT IV.—The mailing of the government check for $155,865.50 to respondent on November 27, 1940, was a delivery on that day and against this check, treated as a routine deposit, respondent had a right of setoff which is beyond the reach of petitioner.

Wholly apart from the assignment, respondent had a right to the government payment by way of setoff.

Treating the transfer of the check to respondent as a deposit merely; the transfer occurred as matter of law on November 27.

The fact that the check of the debtor for the amount of the debt was charged to the account of the debtor did not affect the right of setoff.

POINT I.

Respondent had an assignment of all moneys due and to become due from the government to Graves-Quinn under War Department Contract #6101 qm-131 that was perfected by the tests of section 60a of the Bankruptcy Act on November 22, 1940.

The question under this head is whether the assignment was effective as a transfer as of the execution and delivery of the instrument of assignment (outside the four months' period) or was effective only as of the consent and filing (within the four months' period). By effective, we mean an assignment that meets the requirements of section 60a. That means an assignment so perfected that no purchaser from the assignor and no creditor could thereafter acquire any right in the property transferred superior to that of respondent. It does not mean that the assignment was

enforcible against the obligor before the statutory conditions were fulfilled.

To answer the question raised it is necessary to determine what respondent had in the instrument of assignment on November 22 and what it did not have. By that means we can find out whether respondent had sufficient to satisfy the necessities of section 60a or, as petitioner maintains, pending consent and filing the assignment was a nullity.

As good a way as we know by which to evaluate the assignment when the instrument of assignment was delivered on November 22 and thus answer the main question is to ask and answer three lesser questions as of that date. 1. Was the assignment operative as between assignor and assignee? 2. Was the assignment operative as against a subsequent assignee? 3. Was the assignment operative as against the government?

(1) The assignment was binding on the assignor from the time of the delivery of the instrument of assignment on November 22.

Consent after the event is closely analogous to ratification by a principal of a prior unauthorized act of his agent. In 15 C. J. S. 980, it is said of the word "consent" that "it may be by ratification as well as by previous permission."

In *Pickering* v. *Lomax*, 145 U. S. 310, a deed was executed and delivered by an Indian landowner which by law required the consent of the President of the United States. The consent came thirteen years later. This court held that the deed was just as effective as if the consent had preceded its execution and delivery.

> "So far as the main question is concerned, we know of no reason why the analogy of the law of principal and agent is not applicable here; viz., that an act in excess of an agent's authority, when per-

formed, becomes binding upon the principal, if subsequently ratified by him. The Treaty does not provide how or when the permission of the President shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. * * * A delay of thirteen years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands.

* * * * * * *

"Nor do we consider it material that the grantee had in the meantime died, since if the ratification be retroactive, it is as if it were indorsed upon the deed when given, and enures to the benefit of the grantee of Horton, the original grantee—not as a new title acquired by a warrantor subsequent to his deed enures to the benefit of the grantee, but as a deed imperfect when executed, may be made perfect as of the date when it was delivered."

The Assignment of Claims Act does not require that the consent precede the assignment. The government did not consider the time of the consent material. It honored the assignment without question despite the fact that the consent came not only after the assignment but after the filing.

Petitioner at one time saw an obstacle to giving retroactive effect to the consent in that the consent contains the words "all money due or to become due * * * and not already paid." These words are patently superfluous, as an obligor is not liable for making payment to an assignor before it has knowledge of an assignment even when the assignment is perfected at the time of such payment.

The one concern of the War Department was whether the assignment should or should not be approved, not the time when the assignment should be effective. Because

the department expressly disclaimed a responsibility to the assignee which did not exist anyway is not a reason for losing sight of the limited purpose of the statutory consent.

The Act sets no limit on the time of the required filing. No provision is made for the docketing or indexing of assignments filed. No disability is suggested by reason of delay in filing. No penalty is suggested for failure to file.

As a guide to the construction of the Assignment of Claims Act we can do no better than point to the decision of the New York Court of Appeals in *Amiesite Constr. Corp.* v. *Luciano Contr. Co.*, 284 N. Y. 223. The case involved the State Lien Law, notably section 16. This section, dealing with the assignment of contracts for public improvements or of the money payable thereunder, provides that no such assignment "shall be valid unless * * * filed within twenty days after the date of such assignment of contract, or such assignment of money * * *." The assignment was under attack by a creditor of the assignor due to the failure of the assignee to comply with the statute. The court upheld the assignment even as against a creditor of the assignor.

> "No attack has been directed against the assignment except on the specific grounds that it was void as against appellant because (1) it was not filed as required by section 16 of the Lien Law, and (2) it did not contain the covenant required by section 25 (subd. 5). In spite of the failure of Fiore to file his assignment and the omission of the clause required by section 25 (subd. 5) of the Lien Law it was, however, not void under the circumstances of this case."

The New York Lien Law puts a limit on the time to file and makes validity contingent upon filing. The Assign-

ment of Claims Act fixes no time limit and does not make validity contingent upon filing.

There is nothing in the statute itself to encourage the notion that the assignment was wholly inoperative pending compliance with the routine requirements of the Act. And petitioner's contention that the assignment is to be given effect only as if executed and delivered at the time when all statutory requirements were met is wholly unsupported.

Clearly, the assignment bound Graves-Quinn as well before December 5 as after. On Graves-Quinn at least it was binding from November 22.

(2) From the delivery of the assignment on November 22 no purchaser from Graves-Quinn and no creditor could acquire a superior right to the moneys assigned.

At no time was there any person in being to dispute the right of respondent under the assignment. During December 1940 and January 1941 respondent, pursuant to the assignment received direct from the government the payments due to Graves-Quinn under the contract (R. 7). But as a trustee in bankruptcy is invested by section 60a of the Bankruptcy Act with the powers, if any, of certain specified classes of persons, it is necessary here that respondent's right as assignee be measured against the rights of creditors of, or potential purchasers from Graves-Quinn.

With the adoption of the Chandler Act in 1938 a new formula was introduced for fixing the time of transfers for the purpose of knowing whether they fall within or without the four months' period. For such purpose a transfer is deemed to be made as of the time when so far perfected that no bona fide purchaser from the debtor and no creditor can *thereafter* acquire a superior right. The avowed aim of the amendment was to more effectively strike at secret liens closely preceding bankruptcy.

The aim is not to be confused with the means. Secrecy is not the test.

Nor is it to be assumed that section 60a has any more to do now than formerly with any rule governing the completion of a transfer to the point where no creditor or purchaser can acquire a superior right. Congress has not in the Bankruptcy Act undertaken to exercise jurisdiction in that area. It still belongs to the domain of state law.

What Congress obviously had in mind was to bring within range of the trustee in bankruptcy, if not fully consummated pursuant to state law more than four months before the filing of the petition: (1) transfers subject to recording acts pursuant to which failure to record a conveyance is at the risk that it may be void as against a subsequent purchaser; and (2) pledges of chattels which require change of possession of the pledge if the pledgee is to be protected against a subsequent assignee. The purpose of Congress has been substantially achieved.

In *Carey* v. *Donohue*, 240 U. S. 430, a deed to real property in Ohio was delivered outside four months and recorded within four months of the bankruptcy of the grantor. This court in construing section 60a as it then read held that the four months' period must be computed from the earlier date, thereby making the transfer secure against attack as preferential. Today, on the same facts, the court would compute the four months' period from the recording date and hold the transfer preferential.

The change in section 60a has made no change in the law of Ohio, whereby failure to record makes a deed invalid as to subsequent bona fide purchasers without notice. The hazard of a second sale which is assumed by the grantee who fails to record his deed existed before 1938. It is this possible defect in the grantee's title so long as the recording

is delayed that permits the trustee under the present section 60a to have the benefit of the recording date as the starting point of the four months' period.

Goldstein v. *Rusch*, 56 F. (2d) 10, involved a pledge of tangible property as security. While the pledge was made outside the four months' period, the chattels came into the pledgee's possession within that period. The court held under the former section 60a that the four months' period must be computed from the time of the pledge, regardless of the time the chattels changed hands. Today the court would hold the same transfer preferential because the four months' period must be computed from the time possession is transferred.

The change in section 60a has made no change in the law, whereby the right of a pledgee is defeasible so long as the chattel is withheld. The risk of a second pledge, which the pledgee of a chattel runs who fails to reduce it to possession, was as real before 1938 as after. It is this defect in the uncompleted pledge that permits the trustee under the present section 60a to have the benefit of the date when possession is transferred as the starting point of the four months' period.

The new section 60a neither expressly nor by implication outlaws the doctrine of relation back. What it does is to utilize a limitation on the doctrine that is as old as the doctrine itself.

Every case in which a transfer not preferential before 1938 is preferential now is accounted for by a latent infirmity under applicable law of which the trustee is empowered by the 1938 amendment to take advantage. If there was no such infirmity before 1938 there is none now.

Referring to the present section 60a, this court wrote in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434:

"Its apparent command is to test the effectiveness of the transfer, as against the trustee, by the standards which applicable state law would enforce against a good-faith purchaser."

While the rule is quite general that the pledge of a chattel is perfected only by change of possession of the chattel, there are two rules on the perfection of the assignment of a chose in action.

"The English rule is that he will have preference who first gives notice to the debtor, even if he be a subsequent assignee, providing at the time of taking it he had no notice of the prior assignment."

"The reason for the rule is that in the case of a chose in action the assignee must do everything toward having possession of which the subject admits; he must do that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under obligation to treat it as his property. For this purpose he must give legal notice to the holder of the fund; in the case of a debt notice to the debtor is tantamount to possession. If he omits to give notice, he is guilty of the same degree and species of neglect as one who leaves a personal chattel to which he has acquired title in the actual possession and under the absolute control of another. * * *

"The American rule, as it has been called, is that the assignee that is prior in time is prior in right; that the same rules apply to the sale of a chose in action as in other sales of personal property, and if the seller has sold the thing to one person, and, therefore, has no title to pass to a second, the latter takes nothing by his purchase. This rule has been adopted by at least fourteen states."

Hanna v. Lichtenhein, 182 App. Div. 94, 97.

The so-called American rule prevails in New York and numerous other states.

"In Muir *v.* Schenck (3 Hill. 228), it was held that as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he have given no notice to either the subsequent assignees or the debtor, and the question between a previous assignee and a subsequent attaching creditor was considered the same in principle as that between conflicting assignees. However much that case may have been criticized elsewhere it has been considered well decided in this state."

Williams v. *Ingersoll*, 89 N. Y. 508, 523.

"It is further the settled law of this state, • • • that a bona fide purchaser for value of a chose in action takes it subject not only to the equities between the parties, but also to latent equities in favor of third persons, and that to secure his superiority it is not necessary that the earlier assignee should give any notice of his assignment to the debtor or trustee."

Central Trust Co. v. *West India Imp. Co.*, 169 N. Y. 314.

The plaintiff in *Goodyear Tire & Rubber Co.* v. *Bagg, et al.*, 292 Mass. 125, had been previously sued by one Flower for breach of contract and in that action Flower recovered a judgment for $129,412.50. In the meantime Flower had assigned his interest in the contract to a succession of persons as security for debts owing.

As the debts so secured exceeded the amount of the judgment, an agreement was entered into between Goodyear, Flower and several assignees holding written assignments whereby an agreed sum was paid by Goodyear to each of these assignees regardless of priority of right.

Outstanding at the time was an assignment to one Stoneman for legal services in the earlier action. His right to share in Flower's judgment was disputed and he was not

a party to the distribution agreement. By reason of Stoneman's claim, however, the agreement provided that Goodyear retain a balance of $11,200, bring a bill of interpleader against the various assignees, including Stoneman, for the purpose of testing Stoneman's right to enforce his claim against the undistributed balance, and that so much of the sum as was not awarded to Stoneman should be distributed ratably among the parties to the agreement.

The bill of interpleader was brought and the balance paid into court. In the course of this suit one Rudnick for the first time appeared and asserted that he had lent $1,000 to Flower "on the security of an informal oral assignment" of the Flower claim against Goodyear.

> "The trial judge found and ruled 'that an assignment enforceable in equity was made by Flower to Rudnick of a sufficient portion of his Goodyear claim to secure repayment to Rudnick of his loan to Flower,' that this assignment was next in point of time after Stoneman's assignment and that it 'is valid and effectual to entitle . . . [Rudnick] to be paid $1,044.26 out of the fund in court,' after payment of a sum which he found to be due to Stoneman."

In affirming the decree in favor of Rudnick, the appellate court wrote:

> "The appellants further contend that the agreement of 1933 defeated Rudnick's claim under his assignment, although he was not a party to it and no provision was made for him in it. This contention cannot prevail. Rudnick's assignment was prior in time to those held by the appellants who were parties to the agreement. His lien upon the sums due under the contract between Albert Flower and the plaintiff was therefore senior to theirs. This is true even if he gave no notice of his assignment to the

plaintiff (Thayer *v.* Daniels, 113 Mass. 129; Putnam *v.* Story, 132 Mass. 205, 211; Rabinowitz *v.* People's National Bank, 235 Mass. 102; Cosmopolitan Trust Co. *v.* Leonard Watch Co., 249 Mass. 14, 19) and although his assignment was what is sometimes called an 'equitable' assignment, for the law governing all assignments of choses in action of the kind here involved had its origin in equity, and priorities among them are determined without regard to any distinction between legal and equitable titles. Fairbanks *v.* Sargent, 104 N. Y. 108. Lexington Brewing Co. *v.* Hamon, 155 Ky. 711, 715. Williston on Contracts, §§435, 438, 446a, 447. See Bridge *v.* Connecticut Mutual Life Ins. Co., 152 Mass. 343. Rudnick might lose his rights through a payment by the plaintiff to later assignees before notice of Rudnick's claim (Rabinowitz *v.* People's National Bank, 235 Mass. 102) or by reason of 'a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to' the later assignees, which is treated as equivalent to payment. Williston on Contracts, §435. Salem Trust Co. *v.* Manufacturers' Finance Co., 264 U. S. 182, 199 (note). But there has been no full payment which obliterates the original obligation of the plaintiff."

What the court called the American rule in the *Hanna* case was the rule of the federal courts after, if not before, *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182, and until the decision in *Erie RR. Co.* v. *Tompkins*, 304 U. S. 62, by which independent general law in the federal courts was abandoned in favor of applicable state law.

"There is no decision of this court which sustains the contention that, as between successive assignees of the same chose in action, mere priority of notice gives priority of right. It seems to us that the better reasons are against such a rule. By the first assignment, the rights of the assignor pass to

the assignee. The creditor has a right to dispose of his own property as he chooses, and to require the debt to be paid as he directs, without the assent of the debtor. * * * Notice of the assignment to the debtor adds nothing to the right or title transferred. A subsequent assignee takes nothing by his assignment, because the assignor has nothing to give. * * * If, after assignment, the assignor receives payment from the debtor, he is liable to the assignee. Failure of the first assignee to give notice does not divest him of any title or right, or vest any claim in a subsequent purchaser. It cannot injuriously affect an intending purchaser who makes no inquiry of the debtor concerning the assignor's title. The debtor is not bound to answer inquiries concerning the assignor's title, and there can be no assurance that an intending purchaser can ascertain the encumbrance by inquiry of the debtor having notice of the earlier assignment. * * * It is impossible to eliminate all risk from such a transaction. If the second assignee elects to rely on the representations of the vendor as to his title, and is deceived, he cannot shift his loss to the first assignee, unless some act or omission of the latter was proximate to the deception."

Salem Trust Co. v. *Manufacturers' Finance Co.*, 264 U. S. 182.

Corn Exchange National Bank v. *Klauder*, *supra*, of which petitioner makes much, but the significance of which he misses, involved a transaction in Pennsylvania, whose law at the time required notice to the debtor to perfect the assignment of an account. The assignment fell before the attack of the trustee not because the Supreme Court repudiated the doctrine of relation back as plaintiff says (Point III) but because by the law of Pennsylvania until the assignee gave notice to the debtor the way was wide open to a subsequent assignee to acquire a prior right.

In the recent case of *Rockmore* v. *Lehman*, 129 F. (2d) 892 (cert. den. January 18, 1943, 317 U. S. 700) plaintiff, as trustee in bankruptcy, sued to recover funds deposited in court to which assignees of the bankrupt also made claim. In the Circuit Court the trustee prevailed at first (128 F. (2d) 564), but upon reargument the court repudiated its first decision and affirmed the judgment in favor of the assignees (129 F. (2d) 892).

The assignments, as the first opinion shows, were of moneys to become due to the bankrupt in the course of performance of contracts which it had with Calvert Distillers Corporation. One of the assignments said by the court to be typical of the others appears *in extenso* in the earlier opinion. We emphasize this fact in anticipation that petitioner will use again, as he has before, an ambiguous sentence in the second opinion of Judge Hand in an attempt to distort the holding.

The *Rockmore* decision turned on the law of New York just as certainly as the *Klauder* case turned on the law of Pennsylvania.

> "We cannot agree with appellant's contention that Section 60, sub. a, of the present Bankruptcy Act, 11 U. S. C. A. §96, sub. a, affects our decision, and that there would be an unlawful preference as to any sums paid or payable after knowledge of insolvency. On the contrary we hold that the date of the assignments governed the imposition of the liens on any sums due from Calvert. * * * It has long been the New York law that such an assignment is good against a bona fide purchaser, even though the bona fide purchaser is the first to give notice to the obligor. * * * The same thing is true of an execution creditor or a trustee in bankruptcy."

It is not an occasion for regret that the assignments in the *Rockmore* case by reason of the New York rule were

outside the reach of section 60a. The result there is to be preferred to that in the *Klauder* case which, as this court tells us in footnote 6, was quickly followed by curative legislation in Pennsylvania.

It is patent error to assume that because the changes in section 60a were aimed at secret liens secrecy precludes perfection of a transfer. It is only by indirection that the purpose of the amendment is furthered. It was not section 60a or this court, as petitioner asserts (brief, p. 15) that condemned secrecy if it was condemned in the *Klauder* case. It was the law of Pennsylvania. In the *Rockmore* case the transfer was perfected in secrecy. Because New York is a non-notification state, the court upheld the transfer.

Writing in the Columbia Law Review for January, 1943, on "Some Unsolved Problems under Section 60a of the Bankruptcy Law," Professor Hanna said (p. 69):

> "Most talk of secret liens seems to belong to a dream world. To overlook the fact that book accounts are not displayed in windows nor on store shelves, where in contemporary existence is credit extended on the basis of visible possessions?
>
> * * * * * *
>
> Where an assignment of receivables can be defeated neither by a creditor nor a bona fide purchaser, section 60a does not change the former law. This conclusion is supported by the Second Circuit in the recent case of Rockmore *v.* Lehman."

In this country the doctrine that possession denotes ownership has not been extended to choses in action.

> "The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business, but we have no such statute."
>
> *Grecy* v. *Dockendorff*, 231 U. S. 513.

"In general, the doctrine of reputed ownership, which in England extends to traders' debts (21 Jac. 1, c. 19; Ryall *v.* Rowles, 1 Ves. Sr. 348), does not in the United States include any kind of choses in action (Greey *v.* Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. ed. 339; Clark *v.* Iselin, 21 Wall. 360, 369, 22 L. Ed. 568; Sexton *v.* Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Stackhouse *v.* Holden, 66 App. Div. 423, 73 N. Y. Supp. 203).

* * * * * *

"The origin of the doctrine rested upon the putative credit which the possessor was enabled to enjoy by the display of the goods. Lord Hardwicke, in Ryall *v.* Rowles, *supra,* extended this to traders' debts; but it has gone no further in England, even under the Bankruptcy Act (46-47 Viet. c. 52, §44), and it is at least questionable whether, in the absence of some specific deception, traders' debts are a source of putative credit. However that may be, the rule based upon the possessor's power of disposal in New York arose as an application of the doctrine of reputed ownership of a stock of goods, and should be as much so confined as that doctrine in its other applications."

In re Michigan Furniture Co., 249 Fed. 978.

This court in *Benedict* v. *Ratner,* 268 U. S. 353, again recognized our departure from the English rule.

"The doctrine which imputes fraud where full dominion is reserved must apply to assignments of accounts although the doctrine of ostensible ownership does not."

We know why the statute required the consent of the Secretary of War to the assignment of moneys payable under contracts outstanding on October 9, 1940. It was in

no way related to the interests of creditors of or purchasers from Graves-Quinn.

Whatever the purpose of the filing requirements of the Act, it was not that the general public should have notice. The facts respecting assignments on file are not public property.

Whatever the purpose of the statutory requirement that the surety be notified of the assignment, it was not that the surety might veto it. The hearings on the bill disclose that the surety companies were opposed to it. They sought but were denied veto powers. They wanted to be included among the authorized assignees. This was denied (see hearings before the Judiciary Committee of the House August 28, 1940 on H. R. 10365 and H. R. 10403, to amend section 3477 of the Revised Statutes, p. 44). What they obtained was the provision for notice. To a surety the value of the notice consists of the use it can make of the information received. It is a strictly limited use.

The surety here had no more control over the assignment than any creditor or potential purchaser. It could not, in the words of section 60a "thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein." If, as it claims, it had a higher right, that right was acquired before the assignment to the bank and not "thereafter."

The purpose of the Assignment of Claims Act is best served if lending institutions can rely on it. If an assignment is not effective until the several notices and copies of the instrument are filed, then financing institutions have no security at the time the assignment is executed and delivered. They must wait for the routine details to be completed. In the meantime, they must withhold advances. Otherwise, by *Corn Exchange National Bank* v. *Klauder*, *supra*, "the debt, which is effective when actually made,

will be made antecedent to the delayed effective date of the transfer and therefore [the transfer] will be made a preferential transfer in law, although in fact made concurrently with the advance of money."

(3) The delay in obtaining the consent and in the filing had the effect only of impairing the recourse of respondent to the government.

Again, for our guidance in construing the Assignment of Claims Act, we refer to another decision of the New York Court of Appeals. *Fortunato* v. *Patten*, 147 N. Y. 277, involved a contract to which the City of New York was a party. One of the provisions of the contract is described thus (p. 280):

> "It is provided by the contract in substance that the contractor shall not assign the contract, or any of the moneys payable thereunder, without the consent of the city, signified in writing by the Commissioner of Public Works endorsed on the agreement; that in the absence of such consent no right under the contract, nor to any moneys to grow due by its terms, should be asserted against the City of New York."

Several assignments were made, the first of which did not have the required consent. In reversing General Term the Court of Appeals held that the first assignee, without the consent, was entitled to priority over a subsequent assignee, with the consent.

> "The provision of the contract adverted to has been treated by the court below as rendering void all assignments of moneys to grow due unless the consent of the City was obtained and as available by any assignee to defeat the rights of a senior assignee who had failed to secure the necessary consent.
>
> "We do not think that this provision is capable of any such construction; it was inserted in the

contract solely for the benefit of the City, and prevents any claim being asserted against it in the absence of consent; it is a shield to protect the City, and not a weapon with which a junior assignee is to fight his way to a more favorable position in the line of payment."

Of course, in the absence of the consent of the War Department and the filing, the government made the payment of November 27 to Graves-Quinn. If respondent was willing to assume the risk, it was free to permit the assignor to receive the assigned moneys without losing the benefit of the assignment.

"The necessity for notice by an assignee to the debtor arises where he seeks to protect himself against a payment by the debtor to the original creditor. The debtor is released from liability to the assignee unless he has been notified of the assignment. * * * It is fully established by authority that complainant could legally authorize the company as agent for him to collect the assigned claims and accounts."

Young v. *Upson*, 115 Fed. 192.

"It was not needful to make the assignment or lien valid and effectual against Heath and against his attaching creditors, that notice thereof should have been given to the debtors, the Ingersolls. Such notice was needful only to defeat a subsequent bona fide payment by the Ingersolls."

Williams v. *Ingersoll*, 89 N. Y. 508, 522.

"If a debtor pays, or becomes bound to pay, a later assignee, he is not liable to an earlier assignee who failed to give him notice of his assignment. And if, without notice of any assignment, he pays the assignor, he cannot be held by the assignee. To safeguard against such things, it is necessary for an

assignee to give the debtor notice of his assignment. But it does not follow that mere priority of notice of the later assignee, who took nothing by his assignment will subordinate the rights of an earlier assignee."

Salem Trust Co. v. *Manufacturers' Finance Co.*, 264 U. S. 182.

It is only when the assignor has free use of the proceeds that collection of an account by him prejudices the assignment.

"Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies, the assignment must be deemed fraudulent in law if it is agreed that the assignor may use the proceeds as he sees fit."

Benedict v. *Ratner*, 268 U. S. 353.

If payment by the debtor direct to the assignee were necessary to the validity of an assignment, notice to the debtor would no doubt determine the time when the assignment is perfected. In such event the filing requirements of the Assignment of Claims Act might define what constitutes due notice. As payment to the assignee is not essential to the validity of the assignment, the filing requirements serve only to define the notice to which the government is entitled if it is to make payment to the assignee rather than to the assignor.

When the Appellate Division in its decision (266 App. Div. 599) limited the effect of the delay to the risk to the assignee in permitting the assignor to collect the moneys assigned as agent, it gave the delay all the significance that it merits. That decision draws strength from sources deep in our concept of private property.

An inherent attribute of private ownership is the right of free disposal. Our law is partial to freedom of alienation. So true is this that it is difficult even to contract away the right to assign a chose in action.

> "Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. * * * But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt, that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien."

Portuguese-American Bank v. *Welles*, 242 U. S. 7.

Statutes which have the effect of limiting free alienation are tightly construed. So true is this that the original statute to which the Assignment of Claims Act of 1940 was added is not as forbidding as its language suggests.

In *Martin* v. *National Surety Co.*, 300 U. S. 588, an assignment was upheld which, tested by the statute, was "absolutely null and void." This court looked below the surface for the purpose of the ban on assignments of claims against the government. It found anew that the purpose was government protection. With that purpose served the government was found to be indifferent to assignments by its creditors. Thereupon this court excluded from the ban an assignment needlessly caught in the language of the law. That was discrimination responsive to a sound instinct in favor of the right of alienation.

Because the assignor is in bankruptcy is not a reason for enlarging the purposes for which the consent and filing are required. To do this in the name of section 60a of the Bankruptcy Act would be to arbitrarily add to section 60a an authority to which it has no claim. That section has no answer to the question how a creditor or purchaser can acquire priority over an earlier assignee. It has no standard of its own by which to determine the rights of successive assignees. To know that, it is necessary as we have seen to look to other law. And the meaning of that other law is not to be distorted by reference to section 60a. As surely as section 60a defines perfection of transfer as the time when no creditor or purchaser can thereafter acquire a superior right, just so surely it leaves to other law exclusively the determination when such possibility ceases to exist.

It is usually local law that determines whether an assignee is vulnerable to the claim of a second assignee. It was so in *Corn Exchange National Bank* v. *Klauder, supra.* But whether it is state law or federal law, it is law outside the Bankruptcy Act to which we must look.

POINT II.

By reason of the assignment respondent had at least a property interest in the government payment of $155,865.50 out of which the $150,000 debt of Graves-Quinn was discharged that was superior to any right that any purchaser from or creditor of Graves-Quinn might acquire within four months of the filing of the petition.

Regardless of the import of the consent and filing, respondent had an assignment which attached to the government check in the hands of Graves-Quinn. Respondent

had that much without the Assignment of Claims Act of 1940. For the purposes of this action it does not need more.

Petitioner's interpretation of the Assignment of Claims Act of 1940 is predicated on a rigid construction of the statute (R. S. 3477) to which it is annexed. This in turn rests on *National Bank of Commerce* v. *Downie*, 218 U. S. 345. There were good grounds for the decision in that case, but the ground chosen by the court was disavowed in the later case of *Martin* v. *National Surety Company*, 300 U. S. 588.

Petitioner seeks to limit the applicability of what this court wrote in the *Martin* case. The facts of that case are not the facts of this case admittedly. But the opinion is not for that reason to be tossed aside. This court in considering the statute restricting the assignment of claims against the government had a purpose larger than the determination of a relatively small controversy. It avowedly intended to dispel "the confusion in which the subject is enveloped."

> "Our decision will be kept within the necessities of the specific controversy here. Even so, the grounds chosen, though narrower than those assigned below, may be expected to be helpful as a guide in other cases."

In construing the statute (R. S. 3477), this court had a choice between two lines of cases, one of which was represented by the *Downie* case.

> "The advocates of literalism find color of support in a line of decisions made in very different circumstances from these, but tending none the less to a strict construction of the statute * * *. We do not pause to inquire with reference to all the cases

whether the necessities of the judgment were as broad as the words of the opinion. Thus, in National Bank *v.* Downie, 218 U. S. 345, 54 L. ed. 1065, 31 S. Ct. 89, 20 Ann. Cas. 1116, 25 Am. Bankr. Rep. 199, *supra*, to give a single illustration, where the controversy was between the trustee in bankruptcy of the contractor and prior assignees, the claims against the Government which were the subject of the assignment had never been allowed, much less collected, though the decision cannot be said to have been put on that ground. Another line of cases exhibit an opposing tendency. * * * These cases teach us that the statute must be interpreted in the light of its purpose to give protection to the Government. After payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed. * * * To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason. * * * An assignment ineffective at law may none the less amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice."

The court could deduce from the statute itself that there was no intent to interfere with assignments except in so far as government necessity requires. When that purpose is served, the rights of the assignee are to be recognized without regard to the time of making or form of the assignment.

"The very fact that an assignment is permitted even as between the contractor and the Government itself when the warrant is outstanding, if the transfer be executed with prescribed formalities,

> is significant that the Government is not concerned to regulate the equities of claimants growing out of irregular assignments when collection is complete and liability is ended. The purpose of the statute 'was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.' * * * A transfer of the fund after payment is perfected is of no concern to any one except the parties to the transaction, and this quite irrespective of the time of the assignment or the manner of its making."

The Assignment of Claims Act of 1940 carried further the loosening of the restraints of section 3477 of the Revised Statutes. A construction of the amendment that leaves an assignee worse off than he would be without the amendment is unthinkable.

Without regard to any omissions on the part of respondent measured by the Assignment of Claims Act of 1940 it was entitled to the government check for $155,865.50 received by Graves-Quinn on November 27.

As matter of law respondent had legal title to the check at once upon its receipt by Graves-Quinn.

The plaintiff in *Fairbanks* v. *Sargent*, 117 N. Y. 320, an attorney, had been retained by one Underwood to prosecute a claim against one Zabriskie. To compensate him for past and current services Fairbanks was to have one-third of the recovery, whatever form the recovery might take.

Suit was brought against Zabriskie, and while it was pending Underwood, without Fairbanks' knowledge or consent, transferred the claim to Sargent as collateral security for an antecedent debt.

Thereafter a settlement was made between Underwood, Sargent and Zabriskie pursuant to which Sargent surrendered his assignment, Zabriskie paid Underwood $20,000

in certain bonds in full discharge of his debt, Underwood released Zabriskie and the bonds were delivered to Sargent in satisfaction of his claim against Underwood. Sargent received the bonds in ignorance of plaintiff's interest.

The action was brought by Fairbanks to recover one-third of the bonds. His right thereto was upheld.

> "The moment the release was delivered the bonds became in the legal possession of Underwood through the actual possession of his agent Gray, duly constituted for that special purpose. Underwood, therefore, at that instant, had both the legal title and possession, and it was from and through him, and not from or through Zabriskie, that Sargent acquired his title. At the moment, therefore, when the bonds became Underwood's and in the possession of his agent, the equity of Fairbanks became a legal title to one-third of the bonds in the hands of his co-owner. His equity was gone. The debt to which it pertained was dead and extinguished, and in the instant that the bonds came to the legal ownership of Underwood the share of Fairbanks came to his legal ownership, and the possession of Underwood became his possession (p. 336) * * *. Underwood could hold them in no other way than for himself and his associate, and so, not only was the equity of Sargent through his assignment subject to the prior equity of Fairbanks, but the latter drew to himself the legal title prior to the legal title of Sargent" (p. 337).

In *Central Trust Co.* v. *West India Imp. Co., supra*, the holding in the *Fairbanks* case was followed and extended.

> "I have already said that the case [Fairbanks *v.* Sargent] differs from the present one in that there the second assignee did not part with value at the time of his assignment, but took it as security for an antecedent debt. Nevertheless the defendant claimed

the benefit of the rule that while 'an assignee of a mere equity, like a chose in action, must indeed stand upon the title of his assignor, and must fail if his assignor had made a prior assignment of the same equity, but if, in addition to his equity he succeeds in acquiring the legal title without notice of the prior assignment, that title cannot be taken from him by the prior assignee,' and no point seems to have been made as to the character of the consideration for his assignment. Judge Finch, admitting for the argument only the existence of the rule, held that when the defendant's assignor received the bonds from the debtor, the right of the plaintiff, an earlier assignee, at once attached, and that to the extent of his interest he then acquired, not only the equitable but the legal title, a legal title that was not lost by the transfer of the bonds from such assignor to the defendant, because no new consideration was paid at the time of the transfer. Applying the same reasoning it would seem decisive of the present case. The instant the improvement company received the bonds in negotiable form from the colonial authorities, the plaintiff acquired the legal title thereto as against every one except subsequent purchasers for value and in good faith" (p. 327).

In re Leterman, Becher & Co., 260 Fed. 543, 546, the Court wrote:

> "And the Supreme Court of the United States has held it not unlawful to allow the accounts to remain in the possession of the assignor for collection. In making the collection he acts in a fiduciary capacity, and the money, when collected, becomes the specific property of the assignee or pledgee. *Clark* v. *Iselin*, 21 Wall. 360, 368; 22 L. ed. 568."

As matter of law also respondent's title to the check was not dependent upon the endorsement of Graves-Quinn,

though, as matter of fact, Graves-Quinn endorsed the check and respondent collected it.

In *Freund, et al.* v. *Importers & Traders National Bank*, 76 N. Y. 352, plaintiff drew and delivered a check upon defendant payable to the order of M. Oppenheimer & Sons. The payees delivered the check unendorsed to N. Blun & Sons in payment of a prior indebtedness. Blun had the check certified by defendant. Thereafter plaintiff undertook to stop payment of the check. Defendant, despite plaintiff's notice, paid the check and was sued by the depositor. Judgment for defendant was affirmed.

> "Doubtless there should have been upon the check the written endorsement of the payees, to have saved to it, in the hands of Blun, its original character and quality of negotiable paper. Having been transferred without indorsement Blun got the right only that he would have taken, had it been not negotiable at the start. But whatever right the payees had in the check, at the time when it was transferred to Blun & Sons, that right they could assign, and by the act of assignment did transfer * * * (p. 357). By the certification of a negotiable check, properly negotiated, the depositary of the fund checked upon becomes liable to the owner of the certified paper, and is bound to have in readiness the money to meet it, from the fund drawn upon. When the check is not negotiable, or has not been indorsed, but has by assignment come into the hands of a lawful owner, who has a right to enforce it against the maker, the effect is the same. * * * The rule to govern the transactions with this check, so far as it was accommodation paper, is not different from that which would control doings with an accommodation note. It is settled, that a holder of an accommodation note, without restriction upon him as to the mode of using it, may transfer it either in payment, or as collateral for an antecedent debt, and that the maker

will have no defense against it, in the hands of an indorsee (p. 358). * * * Blun & Sons became the lawful assignees and owners of the instrument, and entitled to have and enforce payment, and after the certification by the defendant, to have payment from it, at the charge of the plaintiffs" (p. 359).

When on November 27 Graves-Quinn mailed the check to respondent, it was only turning over to respondent that to which respondent had an unquestioned right. The mailing on November 27 was delivery to respondent on November 27.

> "'Delivery' means transfer of possession, actual or constructive, from one person to another."
>
> §191 Uniform Negotiable Instruments Act,
>
> §2 New York Negotiable Instruments Law.

That mailing constitutes delivery is further supported by the following cases, to which reference is made elsewhere (*infra*, Point IV):

> *Chapman* v. *Mills & Gibb*, 241 Fed. 715;
> *People* v. *Continental Casualty Co.*, 157 Misc. 15;
> *Bainbridge* v. *Hoes*, 163 App. Div. 870.

Were it to be assumed that as late as November 27 respondent had merely an equitable, as distinguished from a legal claim to the government payment, that is enough. The Supreme Court of New York, in which petitioner elected to bring his suit, is a court of equity accustomed to upholding equitable principles. The same is true of the bankruptcy court itself.

> "A bankruptcy court is a court of equity, §2, 11 U. S. C. A. §11, and is guided by equitable doctrines and

principles except insofar as they are inconsistent with the Act."

Securities & Exchange Commission v. *U. S. R. & Imp. Co.*, 310 U. S. 434.

Petitioner's use of *Judson* v. *Corcoran*, 17 How. 612 (brief, p. 17), is typical of his flight from the realities of this case. How respondent would come out in a contest with a subsequent assignee in possession of the subject matter of the pledge is not an issue here.

Whether a second good faith assignee who has collected is entitled to retain or must account to the first assignee depends on the jurisdiction where the question arises. New York requires a second assignee to turn over. (*Superior Brassiere Company, Inc.* v. *Zimetbaum*, 214 App. Div. 525; *Central Trust Co.* v. *West India Imp. Co.*, 169 N. Y. 314). Some other states permit the second assignee who collects to retain. Before *Erie RR. Co.* v. *Tompkins*, *supra*, the latter rule was followed in the federal courts.

Even in jurisdictions where the second assignee who collects is protected, notice to the debtor is not the equivalent of collecting. Referring to *Judson* v. *Corcoran*, this court in the *Salem Trust Company* case, *supra*, said:

> "Clearly, that case does not hold that mere priority of notice by a later assignee will subordinate the rights of the first purchaser."

Moreover, an assignment as such is not impaired though the rights of the assignee may be lost to a later assignee who realizes on his assignment. To quote again from the *Salem Trust Company* case:

> "It is not accurate to say that notice is necessary to perfect title in the assignee of a chose in action. While failure to give notice may become an important

element in a situation from which equitable estoppel may arise against the first assignee, it cannot be said to be necessary to, or an element in, acquisition of title."

It makes no difference here whether by the tests of section 60a of the Bankruptcy Act the transfer is deemed made when title is acquired or only when the possibility of a second assignee with a defense based on collection is forever gone. On November 27 there was no second assignee to collect. On November 27 Graves-Quinn received the government check and mailed it to respondent. As to this payment at least all possibility of a second assignee was extinguished on November 27.

It is decisive of our contention under this head that the events of November 27 fell outside the four months' period. Petitioner is bound by the facts of that day. He cannot urge in derogation of the transfer any mere potentialities. His authority to assail the transfer in the right of the phantom creditor of section 60a is expressly limited to the period extending backward four months from the filing of the petition. When a transfer is found to be consummated before the statutory deadline it is as conclusive against the trustee as against the assignor.

The Court of Appeals in affirming the Appellate Division put its decision on the unshakable ground that regardless of the effect to be given to the consent and the filing the transfer to the extent at least of the security out of which respondent was paid was perfected, as that term is defined in section 60a, on November 27.

The notion so industriously cultivated by petitioner that controlling federal law went unheeded in the Court of Appeals will not bear scrutiny.

What petitioner sees as departure from the mandate of the Assignment of Claims Act is in reality deference to the

federal courts in the initial interpretation of a federal statute. The Court of Appeals avoided taking a position on the effect, if any, of delay in the consent and filing.

It was the combination of events culminating on November 27 and beyond the power of the trustee to challenge vicariously that settled the issue for the Court of Appeals.

When Judge Lehman wrote that applicable state law "must be applied here" (R. 103) he was not setting up standards alternative to federal standards. He had already examined the Assignment of Claims Act and found that as between the parties the assignment at least effected "an inchoate transfer of the assigned rights or property" (R. 103). The question remained whether the assignment was perfected within the meaning of section 60a. Was there any applicable state law governing the rights of creditors and successive assignees by which respondent might be deprived of the benefit of the assignment? As to the government payment of $155,865.50 there was no need to pursue the inquiry further than to take note of the events of November 27.

> "It is unnecessary to decide * * * whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the defendant on November 27. It seems clear that at least from that time the transfer was perfected.
>
> "Certainly when the contractor received payment by check from the government on November 27 it was in good faith bound to deliver the check or its proceeds to the defendant in accordance with its agreement as evidenced by the executed assignment" (R. 104).

We do not know whether it can be properly said that the surety was a creditor in November, 1940. Assuming it was, what the court wrote is as applicable to it as to any

other creditor. The authority of the trustee is not enlarged by reason of the fact that the bankruptcy proceeding is the individual venture of the surety. If the surety is entitled to the money, petitioner is not entitled to it though he is the tool of the surety. By section 60a, which is the source of petitioner's authority, it is "property of a debtor" only that a trustee can recover. The transfer by Graves-Quinn to respondent of funds in its hands which it was obligated to turn over to the surety lacks the basic ingredient of a preferential payment. Petitioner as trustee in bankruptcy has no legitimate interest in the disposal by Graves-Quinn of money received (if it was so received) for the account of the surety.

To ask us to believe that the surety would have promoted the bankruptcy of Graves-Quinn for the purpose of a preference suit brought by a trustee if it had a right to the money received by the bank is asking too much. If the surety was wronged by the transfer it had a far better remedy than bankruptcy proceedings. In the bankruptcy court the surety participates only as a general creditor (on a parity with respondent, incidentally) after expenses and debts entitled to priority are paid in full (section 64a).

Petitioner says (brief, p. 21) the Court of Appeals mistook his purpose in advancing the claim of the surety. However that may be, the court made no mistake in rejecting it as a significant factor in the case.

It is idle to talk about what the surety might have done prior to November 28 had it known (assuming it did not know) of the assignment to the bank. We are here concerned with whether the transfer to the bank did or did not occur outside the four months' period, and it is begging the question to speculate on whether under other circumstances the surety might have done what it did not do. The trustee can no more maintain his suit on what the

surety failed to do, whatever the reason, than on what the debtor actually did, whatever its motives, outside the four months' period. The omissions of the surety, like the acts of the debtor prior to November 28 are conclusive on the trustee.

In this connection also petitioner taxes our credulity. If there were defaults by Graves-Quinn within the meaning of its agreement with the surety, the surety did nothing about it. And when it received notice of the assignment it did not precipitate the bankruptcy of Graves-Quinn which we are asked to believe would have been done had notice of the assignment been given earlier.

When the surety received the notice of December 2 (R. 13) there was owing to respondent from Graves-Quinn $82,000 (Ex. A, R. 8). The surety was in position to do then anything it might have done prior to November 28. It did not seek to frustrate respondent by causing a petition in bankruptcy to be "immediately filed" (brief, p. 22). Instead it wrote the letter of December 6, reading in part as follows (R. 37, 38):

> "In consideration of such loans as have heretofore or which hereafter may be made by you to Graves-Quinn Corporation, we agree that we, acting alone or with others, will commit no act in any wise to interfere with the performance by Graves-Quinn Corporation of work to be done under said contract until such time as your loans are fully repaid."

The surety waited for bankruptcy proceedings until, with the help of respondent, Graves-Quinn completed performance of its contract. Now it would make respondent an unpaid creditor to the amount of $150,000.

To say that there is no merit in fact or in law to a single contention made on behalf of the surety is to put it mildly.

POINT III.

As payment of the debt on November 28, 1940, was made from security, the time of the transfer was the time when the security position was perfected on or before November 27, 1940.

To say that payment of a debt within the four months' period does not fix the time of transfer if the payment is made out of security is only to state the obvious. The right in the security, of course, is determined as of the time it is received and not as of the time it may be liquidated and the debt paid therefrom.

The rule is no different in the case of choses in action. The right in the security does not depend on receipt of the avails of the assignment.

In *Okin* v. *Isaac Goldman*, 79 F. (2d) 317, plaintiff was trustee in bankruptcy of Quality Publications, Inc., a publisher. Defendant was a printer to whom the bankrupt had assigned as security moneys due and to become due from two distributors of the bankrupt's magazine, one of which was the American News Company.

Payments received were applied by the assignee to past, as well as debts incurred subsequent to the assignment. All the payments were received within four months of the filing of the petition.

> "The payments were alleged to be voidable preferential transfers made within four months of the filing of the petition on January 7, 1932, and the suit was in terms founded upon section 60b of the Bankruptcy Act, 11 U. S. C. A., section 96(b)." (p. 318).
>
> * * * * * * *
>
> "The magazines were distributed to the American News Company prior to September 7, 1931, or more than four months before the filing of the peti-

tion in bankruptcy, and charged to American News Company on its books as and when delivered at 15 cents per copy with a credit of 15 cents for each copy that was not sold. Thus the defendant held an assignment of plaintiff's accounts with the American News Company, covering the issues of May, June, and July, which arose prior to September 7, 1931, although the payments in question were not received until after (p. 319).

* * * * * * *

"In view of the foregoing, the payments to the defendant by the American News Company, in our opinion, created no preference irrespective of whether or not they were upon an antecedent indebtedness to the latter or in liquidation of advances made after April 8, 1931, when the assignment was executed. This is because all of the accounts covered by the assignment arose outside of the four months' period" (p. 320).

In *Rockmore* v. *Lehman*, 129 F. (2d) 892, *supra*, the payment attacked as preferential was made after the filing of the petition. The ultimate decision in that case represented an advance beyond the position taken by the same court in the *Okin* case.

When the *Rockmore* case was first before the Circuit Court, 128 F. (2d) 564, the majority of the court, as was subsequently admitted upon the reargument, misapprehended the nature of assignments of money to become due under a subsisting contract. Because the moneys assigned had not yet been earned, the majority mistakenly deemed the assignments "no more than promises to pay the assignees out of funds to be created by the assignor's labor." That, as Judge Clark observed in the dissenting opinion, was "going back in essence to antique views of the non-assignability of choses in action."

It is settled now that the assignment of moneys to become due under an existing contract stands or falls as against a trustee in bankruptcy not as of the time the moneys assigned are received and applied on the debt, but as of the time the assignment is perfected by the test of section 60a. Here that time as to the government payment of $155,865.59 was not later than November 27.

The fact that respondent carried the notes of Graves-Quinn that were retired on November 28 as unsecured does not discredit the assignment. In respondent's loan ledger (Ex. A, R. 8) the subsequent notes of Graves-Quinn as well were carried as unsecured. That did not detract from the assignment. Throughout December, 1940 and January, 1941, the government made payments direct to respondent pursuant to the assignment (R. 7).

Of course, a security status is not disproved by book entries or other routine entries, any more than a security status is proved by such entries. The relevant facts and not a misnomer determine the issue. Ignorance of the facts even would make no difference (*Mutual Trust Co.* v. *Mercantile National Bank*, 236 N. Y. 478, 87; *Irving Trust Company* v. *Leff*, 253 N. Y. 359, 62).

Whatever the book set-up, respondent was entitled to the avails of the contract. And this is so, though the fact that the right constituted security went unrecognized.

Petitioner in Point VI of his brief is critical of the routine followed in retiring the loan. He puts form above substance. He is doing now what he did in his complaint when he ignored altogether (1) the assignment received by respondent on November 22; (2) the fact that the government payment out of which respondent was paid was received by Graves-Quinn on November 27 and at once turned

over to respondent, and (3) the further fact that the government payment was covered by the assignment.

In his brief (p. 24) petitioner is still maintaining that these facts are meaningless. He cites as "most pertinent" a case (*In re National Lumber Co.*) involving a transfer to an unsecured creditor two days before the filing of the petition (brief, p. 25).

To a litigant who like petitioner overlooked matter of substance only to quibble over unimportant details, the Court of Appeals gave a short answer in *Whiting v. Hudson Trust Co.*, 234 N. Y. 394, 402:

> "Rights and wrongs are not built upon distinctions so inconsequent."

The federal courts have given a like answer (see Point IV, *infra*).

Certainly the right of respondent to payment of its debt out of the government remittance was not lost in the very mechanics of effecting the payment. Routine is not the stuff out of which a forfeiture is wrought.

POINT IV.

The mailing of the government check for $155,865.50 to respondent on November 27, 1940, was a delivery on that day, and against this check, treated as a routine deposit, respondent had a right of setoff which is beyond the reach of petitioner.

Every deposit by a depositor who is indebted to his bank is a potential item of setoff. To be sure, every such deposit, if set off, is likewise a potential item of preference by section 60a of the Bankruptcy Act in the event of the bankruptcy of the depositor. But there can be a preference

only if the deposit set off is made within four months of the filing of the petition.

In *Merrimack National Bank* v. *Bailey*, 289 Fed. 468 (cert. den. 263 U. S. 704), there was application by the bank of deposits made against debts of the depositor. The court wrote:

> "Such deposits or payments to the bank give the bank an inchoate or conditional lien by way of set-off. They are 'transfers' within the meaning of section 60a of the Bankruptcy Act (Comp. St. §9644). If, as in this case, they are made when the depositor is insolvent and when the bank has reasonable cause to believe that such deposits, or loans, or payments, to the bank, will effect a preference, they are, if within the four months period, voidable."

Making the deposit within four months of the filing of the petition was listed as one of the elements necessary to a voidable setoff also in *Elliotte* v. *American Savings Bank & Trust Co.*, 18 F. (2d) 460.

The fact that Graves-Quinn issued its check for $150,000 in payment of the notes does not deprive respondent of the right of setoff otherwise available.

> "Further, throughout the period we are now considering the deposits were made *in the regular course of business*, and, in the absence of fraud or collusion between the bank and the bankrupts with a view of creating a preferential transfer (Bank *v.* Massey, 192 U. S. 138, 148, 24 S. Ct. 199, 48 L. Ed. 380), the bank had a lien thereon and a right of set-off thereunder, the effect of which was not destroyed by the fact that the depositors' voluntary checks were taken for payments on the bank's paper, instead of applying the deposits directly thereon (Studley *v.* Boylston Bank, 229 U. S. 523, 526, 33 S. Ct. 806, 57

L. Ed. 1313; Toof *v.* Bank (C. C. A. 6) 206 F. 250, 252; American Bank, etc., Co. *v.* Coppard (C. C. A. 5) 227 F. 597; Walsh *v.* Bank (C. C. A. 6) 201 F. 522)."

Elliotte v. *American Savings Bank & Trust Co.*, 18 F. (2d) 460.

"The record presents the single question of law as to whether the defendant bank waived its right to set off the deposit against the notes, under section 68 of the Bankruptcy Act (Comp. St. §9652), by accepting the check of the bankrupt, in advance of bankruptcy, and while the bankrupt was insolvent, and in contemplation of bankruptcy.

* * * * * * *

"A preferential payment is one that gives to the creditor paid something he would not have obtained through bankruptcy proceedings, and that would have been ratably distributed among all creditors of the same class, after bankruptcy had intervened. The payment of a note by a check on a deposit of the maker has no such effect. The Bankruptcy Act itself would do what the parties voluntarily did, had they omitted to do it. What the payment of the check transferred to the bank was only what the bank would have obtained as against other creditors of the same class, upon the filing of the petition, through the obligation of the trustee to apply the deposit to the payment of the notes in stating the account between the bank and the bankrupt. The payment of the check could have no effect to give the bank a greater percentage of its debt than other creditors of its class, since it would receive through payment by check only what the Bankruptcy Act would give it, though no such payment had been made to it. As the payment of the check was not a preferential payment, but merely a voluntary accomplishment of an offset, which was provided for by the Bankruptcy Act in the

absence of voluntary action, we see no reason for disallowing the offset because the parties anticipated the action of the law, even though the bankrupt was then insolvent within the knowledge of the bank."

Jandrew v. *Guaranty State Bank of Oxilla*, 294 Fed. 530.

In *Studley* v. *Boylston Bank*, 229 U. S. 523, plaintiff, trustee in bankruptcy of Collver Tours Co., sought to limit the applicability of the setoff provisions of the statute (section 68a) by excluding setoffs made by the parties themselves before the filing of the petition. In denying any such limitation, this court wrote:

"That section did not create the right of setoff, but recognized its existence, and provided a method by which it could be enforced even after bankruptcy. What the old books call a right of stoppage—what businessmen call setoff—is a right given or recognized by the commercial law of each of the states, and is protected by the bankruptcy act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.

"* * * But there is nothing in 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.

* * * * * *

"The bankruptcy act recognizes this right, and it cannot be taken away by construction because of the possibility that it may be abused."

In *Kolkman* v. *Manufacturers Trust Co.*, 27 F. (2d) 659, plaintiff was trustee in bankruptcy of Kewa Novelty Company. Defendant held two notes for $2,500 each, made by

the bankrupt, one maturing on December 18, the other on December 29, 1924. On December 10 the bankrupt paid the two notes by a check upon its account with defendant. The petition was filed on December 15.

The trustee sued to recover the $5,000 payment. It appeared that the bankrupt's balance on December 9 was $3,517.13, and that a deposit of $6,000 was made on December 10. The court held that while the deposit of $6,000 was in effect itself preferential and, therefore, unavailable as a setoff, the same infirmity did not attach to the prior balance of $3,517.13.

> "Only to the extent necessary to make good the nullified check, can it be said that the deposit was made with intent to prefer the bank. Therefore the bank was entitled to a setoff of $3,517.13. To the extent of $1,482.87 the deposit was made with intent to prefer the bank, and is nullified by the statute."

Of particular significance at this point was the holding of the court that the setoff claimed was available though the notes were not due.

> "After bankruptcy, the privilege of setoff is not confined to debts which were due, provided they are provable. In re Semmer Glass Co., 135 F. 77 (C. C. A. 2); Remington Bankruptcy (3d Ed.) § 1455. When the petition in bankruptcy was filed, the bank is to be deemed to hold $5,000, since the payment of the check for that sum was nullified by section 15, on deposit for the bankrupt."

It is clear that the privilege of setoff does not depend on the routine by which it is effected. A deposit made outside the four months' period is beyond the reach of the trustee no matter when or how it is applied to a debt owing.

Every preference is by the statute (section 60a) related to a transfer as that term is defined in section 1(30):

> "'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise."

The transfer of the government check which Graves-Quinn endorsed and mailed to respondent on November 27, 1940, occurred on the day of mailing. It was then that Graves-Quinn parted with possession of, and property in the check.

In *Chapman* v. *Mills & Gibb*, 241 Fed. 715, an equity receivership, Mills & Gibb about noon of May 12, 1916, endorsed to the order of the Merchants National Bank of Providence, R. I., a number of customers' checks, made out a deposit ticket and mailed the checks and deposit ticket to the bank with the intention that the checks should be collected and credited to the account of Mills & Gibb. After the mailing, and on the same day, May 12, 1916, application was made for the appointment of receivers for Mills & Gibb, and receivers were appointed who duly qualified.

After appointment of the receivers and on May 13, 1916, the checks were received by the bank in Providence, whose officers at the time knew of the appointment of the receivers. The checks were collected and applied as collected on overdue notes of Mills & Gibb held by the bank. The receivers disputed the action of the bank.

The question was: Who had the better right to the checks, the receivers or the bank which applied the proceeds upon the notes of Mills & Gibb? In opening his opinion, Judge Mayer wrote:

"Preliminarily it may be stated that the bank has a general lien or title to the checks by virtue of the indorsement and mailing prior to the appointment of receivers in this jurisdiction, irrespective of the physical receipt by the bank unless the appointment of receivers intermediate between the time of the physical mailing and the time of the physical receipt gave the right of possession to the receivers in New York, and that, in such case, the bank would have the right to offset the proceeds of the checks against the overdue notes of Mills & Gibb."

The court stated its problem to be "* * * the effect, in law, of the mailing of the checks prior to the appointment of receivers in the main proceeding in New York."

It is apparent from the opinion that the receivers relied on the postal regulations whereby mailed matter may be recalled by the sender as an impairment of the delivery. The court refused to permit an unexercised right of recall to bedevil the case.

"It may well be that interesting questions would arise if the sender had recalled its letter and the Post Office Department had returned the letter before it reached its intended destination. That, however, is not this case. Some of the cases cited speak of the Post Office Department as an agent, but I am inclined to think that that is rather a loose way of designating the position and function of the department in a case such as this.

* * * * * *

"The basic question in the case is, When did Mills & Gibb lose control of these checks? and the answer is, The moment they were placed in the mail. In that connection it must be emphasized and remembered that the intention of Mills & Gibb is the controlling fact in this case. That intention was

to part forever with possession of these checks, and to cause them to go forward without interference by Mills & Gibb, or anybody else, until they reached their destination. * * *

"* * * The vital point is that Mills & Gibb, by their own act and in accordance with their own intention, relinquished and lost possession of these checks about noon, May 12, 1916, and that Mills & Gibb and the receivers (in addition to any other reasons which may be advanced) for this reason never had the right, at any time after noon of May 12, 1916, to the possession of these checks."

In *People* v. *Continental Casualty Co.*, 157 Misc. 15, 20, the court wrote:

"Also, when the check was deposited in the mail, it was a constructive delivery to Maxwell Brothers, Inc.

"Section 2 of the Negotiable Instruments Law provides that 'delivery' means transfer of possession, actual or constructive, from one person to another.

"When the check was placed in the mail addressed to Maxwell Brothers, Inc., it was a constructive delivery. (Bainbridge *v.* Hoes, 163 App. Div. 870.)"

In *Bainbridge* v. *Hoes*, 163 App. Div. 870, one Guipon in New York, mailed a check to one Foster in Boston. The check was dishonored on presentation because of the death of the drawer. The contest was between the assignee of the payee, and the public administrator.

The case was tried before a referee. That part of his opinion which is pertinent here follows:

"I have considered whether the gift could be sustained as one *inter vivos* because it seemed to me

the most favorable view for the plaintiff. The delivery of the letter with the check to the U. S. Post Office was clearly a delivery to the donee's agent (Kennedy *v.* Kennedy Corp., 32 Misc. 480; Com. *v.* Woods, 142 Mass., 459; U. S. *v.* Nutt, 6 Am. L. Rec., 302); and so the fact that the check did not reach Miss Foster till after Guipon's death does not of itself take it out of the class of gifts *inter vivos*."

The Appellate Division affirmed upon the opinion of the referee.

To characterize the Post Office Department as agent of the addressee may well be deemed a loose manner of speaking. It is just one way of saying that deposit in the mails is a delivery.

When the government check was put in the mail on November 27 there was a delivery by Graves-Quinn to respondent. With the deposit the transfer was perfected just as surely as the pledge of a chattel is perfected by a change in possession or a sale by recording the deed. Nothing remained to be done by either Graves-Quinn or respondent. According to both reason and authority, when that point was reached Graves-Quinn had divested itself of possession and the transfer was beyond the reach of any purchaser from or creditor of Graves-Quinn.

Petitioner's exploitation (Point VI) of the fact that the government check was credited to the account of Graves-Quinn on November 28 is as futile under this head as in relation to the assignment. It made no difference in *Chapman v. Mills & Gibb, supra*, that the checks came to hand and were credited to the depositor's account after the appointment of the receivers. Nor that the proceeds were thereafter applied on notes held by the bank. What mattered was the fact of mailing prior to the appointment.

The stipulation of facts as reported in that case discloses the routine followed.

> "'The said checks were forwarded by Mills & Gibb with the intention that they should be collected by the said Merchants National Bank, and that the proceeds thereof, when collected, should be credited to the account of Mills & Gibb with said bank, and the said bank received the said checks and credited the account of Mills & Gibb with the face amount thereof, subject to the right to charge back against the account of the said Mills & Gibb any of the said checks which were not collected, and subject also to any exchange or collection charges, and the said checks were so credited by the said bank to Mills & Gibb in its account with the latter corporation.'"

The time of the transfer of the government check is not to be identified with the time of payment of the debt. As in the *Chapman* case and others to which reference has been made, the antecedent action of the depositor determines the time of the transfer.

Conclusion.

In moving for summary judgment dismissing the first count of the complaint respondent undertook to show upon undisputed facts that the transfer occurred outside the four months' period. The necessary showing was made to the satisfaction first of the five Justices of the Appellate Division and later of the seven Judges of the Court of Appeals.

The Appellate Division decided in respondent's favor on the ground that the assignment was valid as of its delivery under the Assignment of Claims Act of 1940 as construed by it (Point I, *supra*). The Court of Appeals, avoiding unneeded interpretation of this federal law, set

its decision on the facts peculiar to the case by reason of which respondent is entitled to judgment however the statute is construed.

Petitioner in seeking to discredit the opinion of Judge Lehman, writing for the Court of Appeals, has summed up his exceptions to that opinion in four "Specification of Errors" (brief, p. 7). These specifications are remarkable for the consistency with which they misconstrue the opinion attacked.

The Court of Appeals did not, as stated in Specification 1, hold that the filing related back to the date of delivery of the assignment on November 22, 1940, as against the trustee in bankruptcy. What the Court of Appeals held was that after Graves-Quinn had received the government payment and mailed it to respondent on November 27, the transfer was perfected by the test of section 60a. That concludes petitioner. As a trustee in bankruptcy he has no more than a creditor or purchaser could acquire after November 27. Neither could acquire anything.

The Court of Appeals did not, as stated in Specification 2, hold that no purchaser or creditor could acquire a superior right in the moneys assigned between the date of the execution of the assignment and the date of filing and notice. Its holding was limited to the payment of $155,865.50 received by Graves-Quinn and turned over on November 27, 1940.

The Court of Appeals did not, as stated in Specification 3, hold that the assignment to respondent takes precedence over a prior assignment to the surety. The holding was in effect that if the surety has a superior right to assert it must assert such right in its own behalf. In any case, the trustee in bankruptcy cannot maintain an action in the right of the surety.

The Court of Appeals did not, as stated in Specification 4, hold that the doctrine of relation back was not repudiated by this court in *Corn Exchange National Bank* v. *Klauder*, *supra*. But if it had so held, the holding would be correct. The conclusion of the text book writer which petitioner adopts (brief, p. 18) is palpably erroneous.

We are at a loss to understand petitioner's reliance on the *Klauder* case. The law of Pennsylvania at the time respecting perfection of assignments was not federal law. It was accepted by the federal courts pursuant to the doctrine of *Erie RR. Co.* v. *Tompkins*, *supra*. In *Rockmore* v. *Lehman*, *supra*, the federal courts accepted the New York law on the subject.

When petitioner suggests (Point V) that federal law was neglected in the Court of Appeals, does he mean that since the *Klauder* decision the former Pennsylvania rule is federal law?

Because the events of November 27 did not occur within the four months' period the Court of Appeals had no occasion to declare that perfection of the assignment here did not depend on notice to the debtor. No second assignee could come between respondent and the government payment of $155,865.50 within the four months' period even if the now obsolete Pennsylvania rule were applicable.

The burden which petitioner assumed of showing that the court of last resort of the State of New York erred in affirming the judgment of the State Supreme Court has not been met. The distortion of the court's opinion upon which the argument of petitioner rests is persuasive that the true basis of the decision is unassailable.

We think an affirmance by the Court of Appeals on the opinion of the Appellate Division would have received the approval of this court because of the soundness of that opinion.

In any case the decision of the Court of Appeals was right. And its opinion gives to the decision the increase of strength that comes from reliance on settled law.

The decision of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

WILLIAM A. ONDERDONK,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 188.—October Term, 1944.

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Petitioner, *vs.* Irving Trust Company.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[January 8, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner, trustee in bankruptcy of Graves-Quinn Corporation, the debtor, brought this suit in the Supreme Court of New York to recover the sum of $150,000 paid by the debtor to respondent, its creditor. The payment was alleged to be an unlawful preference under § 60a of the Bankruptcy Act, 11 U. S. C. § 96. Respondent moved for summary judgment under Rule 113 of the New York Rules of Civil Practice, on the ground that the transfer did not occur within four months of bankruptcy, and hence was not a preference under § 60a. The Supreme Court of New York denied the motion, but the Appellate Division of the Supreme Court reversed, dismissing the complaint. 266 App. Div. 599. The New York Court of Appeals affirmed, 292 N. Y. 347, holding that the transfer was not made within four months of bankruptcy.

We granted certiorari, 323 U. S. —, on a petition raising questions important to the administration of the Bankruptcy Act, only one of which we find it necessary to decide. That question is whether a check, made payable to the bankrupt and endorsed and mailed by it to respondent more than four months before bankruptcy, but received by respondent and credited upon the bankrupt's antecedent debt within the four months, is, by the applicable law, a transfer within the four months period, within the meaning of § 60a.

In September, 1940, the Graves-Quinn Corporation, later adjudicated a bankrupt, entered into a contract with the United States, acting through the War Department, for the construction

of military housing. The required payment and performance bond was given by a surety to the Government, and at the same time, October 2, 1940, the surety took from the debtor as security an assignment of all sums payable on the contract.

Beginning in October, 1940, respondent, a trust company, made loans from time to time to the debtor to finance its operations under the government contract. It was agreed that the loans were to be repaid from the money to be received under the contract. On November 20, 1940, the debtor executed and on November 22 delivered to respondent a written assignment of these moneys to become due. The assignment was made without at that time giving the notices and procuring the consent of the Secretary of War, which, by the Assignment of Claims Act of October 9, 1940, 54 Stat. 1029, amending R. S. § 3477, 31 U. S. C. § 203, were required in order to give validity to the assignment.[1]

On November 27, 1940, after the assignment, the Government delivered to the debtor its check for $155,865.50 as a progress payment then due upon the contract. The debtor on that date endorsed the check and mailed it to respondent, accompanied by its own check for the sum of $150,000, made payable to respondent and drawn upon the debtor's account with respondent. On November 28th, which was exactly four months before the petition in bankruptcy was filed on March 28, 1941, respondent received the checks and credited $150,000 of the proceeds of the Government check on four promissory notes of the debtor, aggregating $150,000.

On November 27 respondent sent to the Secretary of War its assignment of the sums due and to become due on the contract, and on December 2, gave the other notices required by the statute regulating assignments of claims against the United States. On December 5, the assignment was approved by the Secretary of

[1] Section 3477 of the Revised Statutes, 31 U. S. C. § 203, declares that the assignment of any claim upon the Government shall be "absolutely null and void" unless made after the allowance of the claim and the issue of a warrant for its payment. But by the amendment of October 9, 1940, it was provided that such assignments of claims in excess of $1,000 for money due or to become due from an agency or department of the Government upon contracts entered into with the Government before the date of the amendment should be valid when made to a bank or trust company upon notice to the surety on the contractor's bond, and to certain specified officers of the Government, including the contracting officer or head of the department concerned, and upon consent of the head of that agency or department.

War, and on that date the conditions of a valid assignment, prescribed by the statute, had been fully satisfied.

By § 60a of the Bankruptcy Act "a transfer . . . of any of the property of a debtor to . . . a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy . . . , the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class" is declared to be an unlawful preference. Only a single issue was raised by respondent's motion for summary judgment, whether the debtor's transfer to respondent of $150,000 of the progress payment by the Government was made and perfected more than four months before the petition in bankruptcy was filed.

The Court of Appeals resolved this question in respondent's favor upon two independent grounds. One is that while the assignment was not perfected until December 5, 1940, within the four months period, when the necessary notices had been given and consent obtained, the assignment was to be regarded as then retroactively validated as of its date of November 22, 1940, which was more than four months before the bankruptcy. The other ground is that the transfer became complete on the debtor's endorsement and mailing of the Government check to respondent on November 27, more than four months before the bankruptcy.

As we sustain the judgment on the second ground we have no occasion to consider the first or to express any opinion upon it. For the purpose of determining the adequacy of the second ground, it is unnecessary to consider the effect of the assignment upon the right of respondent, as an assignee, to demand payment from the Government or the assignor of the amounts due on the contract. For here the payment was made by the Government to the assignor, which paid it to respondent before the assignment was validated by the requisite notices and consent. The provisions of the statute governing assignments of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves. *Martin* v. *National Surety Co.*, 300 U. S. 588, 594-595. Here, the payment having been made to the contractor and by it delivered to respondent before the assignment was perfected, the Government's obligation was dis-

charged; and the situation was no different than it would have been if no assignment had been made. The question is thus presented whether the endorsement and mailing of the check to respondent operated as a transfer on the date of mailing, rather than on the date of its receipt, so that the transfer was made and perfected before the four months period.

What constitutes a transfer and when it is complete within the meaning of § 60a of the Bankruptcy Act is necessarily a federal question, since it arises under a federal statute intended to have uniform application throughout the United States. *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95, and cases cited; *Steele* v. *Louisville & Nashville R. R. Co.*, No. 45, decided December 18, 1944, p. 9 of slip opinion. The statute provides its own definitions. Section 1(30) of the Bankruptcy Act declares that "'transfer' shall include the sale and every other . . . mode . . . of disposing of or of parting with property . . . or with the possession thereof . . . ." And § 60a provides that a "transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein. . . ."

In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of a state law. And hence § 60a's "apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law would enforce against a good faith purchaser." *Corn Exchange Bank* v. *Klauder*, 318 U. S. 434, 436-7. See also *Benedict* v. *Ratner*, 268 U. S. 353, 359, and cases cited. Section 60a in this respect, as do numerous other federal statutes, see *Davis Warehouse Co.* v. *Bowles*, 321 U. S. 144, 153-156, and note 20 and cases cited, thus adopts state law as the rule of decision. The state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected.

As we have seen, § 1(30) includes in the term "transfer" "every . . . mode of . . . parting with property . . . or with the possession thereof". When the debtor endorsed the Government check and placed it in the mails, he parted with the possession

and intended to part with the property in it, at a time (before the four months period) when the transfer of the property to respondent would not be an unlawful preference. Whether the transfer was perfected on mailing the check thus turns on a question of state law, to which the highest court of the state has here given an authoritative answer.[2] The Court of Appeals recognized that only such a "parting with property" in the check, as would preclude the debtor from transferring any interest in the check to a creditor or bona fide purchaser, would perfect the transfer to respondent within the meaning of § 60a. The court also recognized that in this respect state law controlled decision. It found it unnecessary to consider whether a creditor or bona fide purchaser could have obtained rights in the $150,000 prior to the endorsement and mailing of the government check on November 27, since it thought that the "delivery of the moneys to the assignee was complete" at that time.[3] The state court having applied the proper test under § 60a, we accept its conclusion that the transfer was made more than four months before bankruptcy

[2] The endorsement and mailing of the government check took place in Boston, Massachusetts. There is no contention that the substantive law of Massachusetts determines the legal effect of these acts, nor that that law differs from the law of New York. Hence it is unnecessary to decide whether the problem of choice of law under § 60a is to be resolved by federal standards, or whether that section also adopts the conflict of laws rules of the forum. If the former be the case, it would be necessary for this Court to determine whether the New York Court of Appeals should have followed Massachusetts law; and if so this Court would be under the duty of making an independent investigation of the Massachusetts law. Cf. *Barber* v. *Barber*, No. 51, decided December 4, 1944, page 3 of slip opinion; *Adam* v. *Saenger*, 303 U. S. 59, 64, and cases cited. But if the statute adopts the local conflict of laws rules, the present case would turn on New York law, even though the applicable rule adopted by New York were the same as the substantive law of Massachusetts. For "Even where the state of the forum adopts and applies as its own the law of the state where the injury was inflicted, the extent to which it shall apply in its own courts a rule of law of another state is itself a question of local law of the forum." See *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 445, and cases cited.

[3] The Court of Appeals said, 292 N. Y. 347, 358-359: "The test under the statute as amended in 1938 is, as I have said, whether no 'bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein.' The 'standards which applicable state law would enforce against a good faith purchaser or against a creditor must be applied here.' . . . It is unnecessary to decide . . . whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the [respondent] on November 27th. It seems clear that at least from that time the transfer was perfected. . . . [From] the time that the check was deposited in the mail . . . delivery of the moneys to the assignee was complete."

Petitioner, relying on *Martin* v. *National Surety Co.*, *supra*, argues that as a matter of federal law the surety company, which is a creditor, has rights to the proceeds of the government contract, superior to those of respondent, and sufficient to require respondent to relinquish the payment made to it. It does not appear that the surety has made any such claim. The surety, whose claim, if it has one, is adverse and superior to that of petitioner and the other creditors, is not a party to this suit. The affidavits submitted on the motion for summary judgment do not frame any such issue, and we are not pointed to any allegation in them that any amount is due and owing from the bankrupt to the surety. Hence the claim, if it exists, is not one which could be adjudicated here.

In any event the affidavits fail to establish the asserted priority of the surety over respondent. The surety did not perfect its assignment by giving the notices and procuring the consent required by the statute. It did not receive the proceeds of the contract here in question. They were paid to respondent which does not appear to have had any notice of the prior assignment of the surety. Under the federal rule, respondent is entitled to retain the assigned money which it received without notice of the prior assignment to the surety. *Judson* v. *Corcoran*, 17 How. 612; cf. *Salem Co.* v. *Manufacturers' Co.*, 264 U. S. 182, 192-193. The *Martin* case does not control here, since the subsequent assignee in that case took with notice of an earlier assignment and as part of an obviously fraudulent scheme. These facts, which were sufficient in that case to require that the subsequent assignee relinquish the transferred funds, are lacking here. Hence it is unnecessary to consider whether, as the Court of Appeals held, the trustee is without standing to assert alleged rights of the surety.

Affirmed.

Mr. Justice BLACK dissents.